DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-875
Title: Lynwood D. Hall, et ux., Petitioners
v
United States
Docketed: January 5, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-17267)
Decision Date: August 16, 2010
Rehearing Denied: October 1, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 30 2010	Petition for a writ of certiorari filed. (Response due February 4, 2011)
Jan 27 2011	Order extending time to file response to petition to and including March 7, 2011.
Feb 28 2011	Order further extending time to file response to petition to and including April 6, 2011.
Mar 30 2011	Order further extending time to file response to petition to and including May 6, 2011.
May 2 2011	Order further extending time to file response to petition to and including May 13, 2011.
May 13 2011	Brief of respondent United States filed.
May 20 2011	Reply of petitioner Lynwood D. Hall, and Brenda A. Hall filed. (Distributed)
May 24 2011	DISTRIBUTED for Conference of June 9, 2011.
Jun 13 2011	Petition GRANTED.
Jul 1 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 17, 2011.
Aug 17 2011	Joint appendix filed. (Statement of costs filed)
Aug 17 2011	Brief of petitioners Lynwood D. Hall, and Brenda Hall filed.
Aug 24 2011	Brief amici curiae of Professors Neil E. Harl, et al. filed.
Aug 24 2011	Brief amici curiae of Donald W. Dawes and Phyllis C. Dawes filed.
Sep 12 2011	SET FOR ARGUMENT ON Tuesday November 29, 2011.
Sep 14 2011	CIRCULATED
Sep 16 2011	Brief of respondent United States filed. (Distributed)
Sep 23 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Sep 23 2011	Record from U.S.D.C. for the District of Arizona (Tuscon) is electronic.
Oct 14 2011	Reply of petitioners Lynwood D. Hall, et ux. filed. (Distributed)
Nov 29 2011	Argued. For petitioners: Susan M. Freeman, Phoenix, Ariz. For respondent: Pratik A. Shah, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

FILED

10-875 DEC 30 2010

No. _____

OFFICE OF THE CLERK

In The Supreme Court of the United States

LYNWOOD D. HALL and BRENDA A. HALL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After filing a Chapter 12 bankruptcy petition, Petitioners sold their family farm with the consent of their bankruptcy trustee and court approval, and with sale proceeds administered through the bankruptcy estate to pay creditors. Internal Revenue Code § 1399 provides that a bankruptcy filing other than an individual Chapter 7 or individual Chapter 11 does not give rise to a "separate taxable entity." Does that IRC provision mean that the capital gains income tax incurred due to the sale of the farm is not a Bankruptcy Code administrative expense owed by the bankruptcy estate and payable under a bankruptcy reorganization plan? If so, Bankruptcy Code § 1222(a)(2), enacted to provide special treatment of such family farmer administrative expenses, would not apply or permit Petitioners to satisfy the tax as an unsecured claim that is not required to be paid in full.

RULE 14.1 AND 29.6 STATEMENT

There are no corporate parties or parent corporations of parties in this case.

LIST OF PARTIES

Lynwood D. Hall and Brenda A. Hall are the petitioners. The United States of America is the respondent.

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Lynwood D. Hall and Brenda A. Hall hereby petition for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Hall*, Case No. 08-17267.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 617 F.3d 1161 (9th Cir. 2010) and attached in the Petition Appendix ("Pet. App.") 1. The August 6, 2008 order of the United States District Court for the District of Arizona in this case is reported at 393 B.R. 857 (D. Ariz. 2008), and set forth as Pet. App. 18. The October 7, 2007 memorandum decision of the United States Bankruptcy Court for the District of Arizona is reported at 376 B.R. 741 (Bankr. D. Ariz. 2007) and attached as Pet. App. 34.

JURISDICTION

The opinion of the Ninth Circuit was filed on August 16, 2010. Pet. App. 1. The Ninth Circuit denied rehearing en banc on October 1, 2010. Pet. App. 47. The Ninth Circuit stayed its mandate pending Petitioners' appeal to this Court. Pet. App. 48. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the bankruptcy court

and district court were invoked under 28 U.S.C. §§ 157, 158, and 1334.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S. CONST. art. I, § 8, cl. 1; 11 U.S.C. §§ 503(b)(1)(B)(i), 507(a)(2), 507(a)(8), 541(a), 1207(a), 1222(a)(2)(A), and 1305; and 26 U.S.C. §§ 1398 and 1399. The relevant provisions of the United States Bankruptcy Code and Internal Revenue Code are set forth in full in Pet. App. 49-55.

STATEMENT OF THE CASE

Family farmers may file for bankruptcy relief under Chapter 12 of the Bankruptcy Code, 11 U.S.C. §§ 1201-1231. In 2005, Congress modified 11 U.S.C. § 1222(a)(2)(A) to provide that a Chapter 12 plan of reorganization shall "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 [of the Bankruptcy Code], unless . . . the claim is a claim owed to a governmental unit that arises as a result of the sale . . . of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507." Thus, when Section 1222(a)(2)(A) applies, a Chapter 12 debtor may pay less under a plan of reorganization than the full amount of a claim for

federal income taxes that arises from the sale of assets used in the debtor's farming operation.

The facts of this case are simple and typical. Petitioners are a husband and wife who operated a family farm. They filed a Chapter 12 bankruptcy petition on August 9, 2005. *See* Pet. App. 35. With the consent of their Chapter 12 trustee and the approval of the bankruptcy court, Petitioners sold their farm for $960,000. *Id.* The sale generated a postpetition capital gains tax of about $29,000. *Id.* The Petitioners subsequently filed their plan of reorganization, in which they proposed to recognize the capital gains tax as an administrative expense of their bankruptcy estate and treat it as an unsecured claim, which would be paid pro rata to the extent funds were available, with the balance discharged as permitted by Bankruptcy Code § 1222(a)(2)(A). *See* Pet. App. 35.

The Internal Revenue Service ("IRS") objected to the Debtor's plan based on Internal Revenue Code (26 U.S.C. or "IRC") § 1399. It provides that no "separate taxable entity" results from the commencement of a bankruptcy case under any Chapter of the Bankruptcy Code except for individual debtors' Chapter 7 liquidation and Chapter 11 reorganization cases. *See* 26 U.S.C. § 1399. Thus, no "separate taxable entity" exists in a Chapter 12 case, in a business Chapter 7 or Chapter 11 bankruptcy case, or in a Chapter 13 case.

The IRS argued that the postpetition capital gains tax was not an administrative expense under

Bankruptcy Code §§ 507(a)(2) and 503(b) because it was not "incurred by the estate" as required to qualify as an administrative expense, and was instead an obligation of Petitioners individually. *See* Pet. App. 35. Without administrative expense status, the IRS claimed, Bankruptcy Code § 1222(a)(2)(A) was inapplicable to postpetition tax claims. *See* Pet. App. 40.

The Bankruptcy Court agreed with the IRS and sustained the government's objection. *See* Pet. App. 46. On appeal, the District Court reversed the Bankruptcy Court, holding that the Petitioners were entitled to treat the capital gains tax as a dischargeable unsecured claim because Congress's clear intent in enacting Bankruptcy Code § 1222(a)(2)(A) was to permit family farmers to discharge in bankruptcy claims owed to governmental entities relating to the sale of farm assets, whether the sale occurred before or during the bankruptcy case. *See* Pet. App. 32-33.

The Ninth Circuit, in a 2-1 decision, agreed with the Bankruptcy Court, and reversed the District Court. *See* Pet. App. 6, 16. Under the Ninth Circuit's ruling "the tax is payable in full because it is incurred and owed by the debtor outside the plan." *See* Pet. App. 7 n.2. The opinion below was not based on Bankruptcy Code § 1222(a)(2)(A), but rather almost entirely on the Ninth Circuit's conclusion that a Chapter 12 bankruptcy estate cannot incur taxes under IRC § 1399. *See* Pet. App. 7-8. Because IRC § 1399 applies to business bankruptcies and Chapter

13 bankruptcies, its rationale applies in those contexts as well. *See* Pet. App. 10 n.4.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's published decision is directly in conflict with a published Eighth Circuit opinion and several lower court decisions, and the issue is pending in two cases before the Tenth Circuit. The circuit split is irreconcilable and can only be resolved by this Court. It is causing inconsistency in the administration of the Bankruptcy Code and the Internal Revenue Code, and is of significant importance to the agricultural community. In the Ninth Circuit, family farmers who sell any farm assets postpetition must pay the capital gains taxes on those sales in full from non-estate assets, effectively making postpetition tax liabilities into debts that are not discharged and are payable individually even as the farmers are required to use the proceeds of their estate asset sales and their income to pay creditors under their Chapter 12 plans – the very thing Congress intended to prevent by enacting Bankruptcy Code § 1222(a)(2)(A). It obliges family farmers to have the foresight to sell their farms in the tax year before bankruptcy if they are to deal with resulting taxes under their plans, leaving creditors without court oversight of the sales. In the Eighth Circuit, family farmers are able to discharge these taxes under their plans of reorganization. This lack of uniformity should be rectified.

The Ninth Circuit's rationale for its ruling and conclusion that taxes incurred during a bankruptcy case are not administrative expense claims of the bankruptcy estate when there is no separate IRC taxable entity is flatly inconsistent with this Court's authority that taxes incurred during the existence of a bankruptcy estate are payable by the bankruptcy estate as administrative expenses. Notably, the logic of the opinion below is not limited to Chapter 12 bankruptcy cases. Because IRC § 1399 applies to all cases other than individual Chapter 7 and Chapter 11 bankruptcies, the Ninth Circuit's decision encompasses the much larger category of corporate Chapter 11 bankruptcies. The rationale of the opinion below is in direct conflict with settled law in other circuits regarding the treatment of postpetition tax claims in corporate Chapter 11 bankruptcies. The Ninth Circuit's ruling impairs the coherent and consistent interpretation of the IRC and Bankruptcy Code in multiple contexts.

The opinion is especially problematic for farmers. Congress determined that family farmers are important enough to warrant their own Chapter of the Bankruptcy Code, and added § 1222(a)(2)(A) to that Code in 2005 to increase the protections provided to farmers by Chapter 12. The decision below eviscerates that extra protection at a time when family farmers are increasingly turning to Chapter 12 for relief. There has been a flurry of reported cases on this issue in the last few years because today's difficult economy has made this issue one of increasing

importance. The number of unreported decisions is likely significant as well. The Court should step in to provide a definitive resolution to this important legal issue to enable family farmers to receive fair and uniform treatment by federal bankruptcy courts throughout the country, and to implement Congressional intent.

I. The Circuits Are Divided.

A. The Circuits Are Split Over the Treatment of Postpetition Income Taxes in Chapter 12 Bankruptcy Cases.

The dissenting judge in the decision below pointed out that the majority had created a split with the Eighth Circuit. *See* Pet. App. 17. The Eighth Circuit held in *In re Knudsen*, 581 F.3d 696 (8th Cir. 2009), that under Bankruptcy Code § 1222(a)(2)(A), a family farmer who files a petition under Chapter 12 may treat a federal income tax that arises from the postpetition sale of farm assets as an unsecured claim in the debtor's plan of reorganization. *Knudsen* concluded that the administrative expense claim definition of "any tax incurred by the estate" in Bankruptcy Code § 503(b)(1)(B)(i) means any tax "incurred postpetition." 581 F.3d at 703 (citing *In re L.J. O'Neill Shoe Co.*, 64 F.3d 1146 (8th Cir. 1995)). Because income tax from a postpetition asset sale is incurred POST petition, the Eighth Circuit concluded that it was incurred "by the estate" and qualified as an administrative expense under § 503(b)(1)(B)(i). *Knudsen*, 581 F.3d at 708-09. The court noted that even though no "separate taxable

entity" under the IRC is created by the filing of a Chapter 12 petition, a bankruptcy estate exists nonetheless, and the farm assets are property of that estate. *Id.* at 709. Because the federal income tax was an administrative expense, the tax was entitled to priority under Bankruptcy Code § 507(a)(2), and the Debtor could therefore take advantage of Bankruptcy Code § 1222(a)(2)(A). *Id.*

In the opinion below, the Ninth Circuit came to the opposite conclusion, finding that an IRC provision determined the meaning of the Bankruptcy Code provision. It conflated the bankruptcy concept of an "administrative expense" with IRC § 1399, which provides that "no separate taxable entity shall result from the commencement of a case under [the Bankruptcy Code] except in any case to which [IRC §] 1398 applies." Because IRC § 1398 does not apply to Chapter 12 cases, the Ninth Circuit concluded that the filing of a bankruptcy petition does not give rise to a bankruptcy estate capable of incurring taxes. *See* Pet. App. at 6, 12. Accordingly, it held that a tax arising from the sale of bankruptcy estate assets was not "incurred by the estate" under Bankruptcy Code § 503(b)(1)(B)(i), so it did not qualify as an administrative expense. *Id.* at 5-7. And because the tax did not qualify as an administrative expense, it was not entitled to priority under Bankruptcy Code § 507, and Bankruptcy Code § 1222(a)(2)(A) therefore did not apply. The result of the Ninth Circuit's opinion is that such tax claims must be treated outside Chapter 12 plans, and must somehow be paid by family

farmer-debtors individually even though the proceeds of their asset sales and their income is property of their bankruptcy estates and is to be devoted to payment of their creditors and administrative expense claimants under their Chapter 12 plans. Many of them lack sufficient income to pay both their plan obligations and their farm sale taxes. *See* 11 U.S.C. § 1207(a) (postpetition income is property of Chapter 12 estate); 11 U.S.C. § 1222(a) (plan shall provide for submission of future earnings as necessary for execution of the plan); 11 U.S.C. § 1222(c) (plan lasts 3-5 years).

The holdings in *Knudsen* and the opinion below are diametrically opposed. The Ninth Circuit's holding is also directly contradicted by every other court to consider the issue, with the exception of the bankruptcy court's ruling in Petitioners' case. *See, e.g.*, *Knudsen*, 581 F.3d at 710; *In re Ficken*, 430 B.R. 663 (B.A.P. 10th Cir. 2010); *In re Dawes*, 415 B.R. 815 (D. Kan. 2009); *In re Hall*, 393 B.R. 857 (D. Ariz. 2008); *In re Knudsen*, 389 B.R. 643 (Bankr. N.D. Iowa 2008); *In re Schilke*, Nos. 4:07CV3283, 0641813, 2008 WL 4224279 (D. Neb. Sept. 9, 2008); *In re Uhrenholdt*, No. BK06-40787-TLS, 2009 WL 198966 (Bankr. D. Neb. Jan. 26, 2009); *In re Dawes*, 382 B.R. 509 (Bankr. D. Kan. 2008); *In re Gartner*, No. BK06-40422-TLS, 2008 WL 5401665 (Bankr. D. Neb. Dec. 29, 2008); *In re Rickert*, No. BK06-40253-TLS, 2008 WL 5401663 (Bankr. D. Neb. Dec. 29, 2008); *In re Schilke*, 379 B.R. 899 (Bankr. D. Neb. 2007); *see also* 4 Alan N. Resnick and Henry J. Sommer, *Collier on Bankruptcy* ¶ 503.07[2][a][i] at 503-62 (16th ed. 2010) ("The

majority view . . . appears to be that a debtor may utilize section 1222(a)(2)(A) to treat taxes generated from the postpetition sale of farming assets as unsecured claims, and that these claims are subject to discharge in the chapter 12 case."); Arthur Boelter, *Merstens Law of Federal Income Taxation* § 54:61 (Updated Dec. 2010) ("This exception applies to strip the priority of tax on gains realized both before and after the petition date. . . ."); David A. Lander, et al., *Business Workouts Manual* § 15:73 (updated Oct. 2010) (noting that most courts have rejected the IRS's argument); Katherine M. Porter, *Phantom Farmers: Chapter 12 of the Bankruptcy Code*, 79 AM. BANKR. L.J. 729, 738 (2005) ("Certainly any dispositions made after the bankruptcy filing under the terms of the Chapter 12 plan qualify under section 1222(a)(2)."). Two cases dealing with this issue are pending before the Tenth Circuit. *See In re Dawes*, Case No. 09-3129; *In re Ficken*, Case No. 10-1276.

A leading treatise on bankruptcy law has noted that this issue is ripe for review by this Court due to the circuit split. *See* 15 Alan N. Resnick and Henry J. Sommer *Collier on Bankruptcy* ¶ TX2.03[2][a][iii] (online Lexis version).

B. The Ninth Circuit's Failure to Apply Fundamental Bankruptcy Taxation Principles Conflicts With Many Other Cases, Including Those Involving Different Chapters of the Bankruptcy Code.

The Ninth Circuit's decision is much more far-reaching than it appears. IRC § 1399 applies to all bankruptcy cases other than those involving individual debtors under Chapter 7 and Chapter 11. *Compare* 28 U.S.C. § 1399 (noting that § 1399 applies to all bankruptcy cases except those to which § 1398 applies), *with* 28 U.S.C. § 1398 ("[T]his section shall apply to any case under chapter 7 . . . or chapter 11 . . . of [the Bankruptcy] Code in which the debtor is an individual."); *see also Knudsen*, 581 F.3d at 708 n.2 (noting that IRC § 1399 applies to Chapter 11 corporate cases). Bankruptcy Code § 1222(a)(2)(A) specifies treatment for a particular kind of administrative expense tax claim, that of a family farmer selling farm assets. Because IRC § 1399 applies in all cases other than individual Chapter 7 and 11 cases, however, the Ninth Circuit's logic creates circuit divisions and inconsistent treatment when applied to other tax claims, including tax claims incurred during corporate Chapter 11 bankruptcy cases. The opinion below implicates taxation in all cases other than individual Chapter 7 and 11 cases. *See Dawes*, 382 B.R. at 518.

The Bankruptcy Code accords second priority distribution status to administrative expenses. 11 U.S.C. §§ 507(a)(2), 503(b). Administrative expenses

include taxes "incurred by the estate except a tax of a kind specified in 507(a)(8) of this title" (a section which provides for lower priority treatment but still ahead of general unsecured creditors). This Court has recognized in the context of the Bankruptcy Act, the predecessor to today's Bankruptcy Code, that taxes incurred during the period of bankruptcy administration are obligations of the bankruptcy estate entitled to administrative priority. *See Nicholas v. United States*, 384 U.S. 678, 687-88 (1966) ("[T]axes incurred during the arrangement period are expenses of the Chapter XI proceedings and are therefore technically a part of the first priority under s 64a(1)."); *see also In re Colortex Indus., Inc.*, 19 F.3d 1371, 1381-82 (11th Cir. 1994) (noting that the Code mirrors the priority scheme for tax claims under the Act and that *Nicholas* remains good law).

Indeed, it is a fundamental principle of income taxation "that income is taxed to the party who earns it." *See United States v. Bayse*, 410 U.S. 441, 447 (1973). "It is command of income and its benefits which marks the real owner of property." *Higgins v. Smith*, 308 U.S. 473, 478 (1940). A serious flaw in the Ninth Circuit's reasoning is that by viewing the Debtor and the Chapter 12 estate as distinct entities for income tax purposes, it reaches a result that is directly at odds with this principle. Petitioners' bankruptcy estate commanded the income derived from the sale of their farm, and the estate reaped its benefits. The estate owned the farm by virtue of Bankruptcy Code § 541(a)(6), and owned the sale proceeds

by virtue of that section and Bankruptcy Code § 1207(a). Petitioners individually received nothing from the sale of their farm; all of the proceeds went to pay the Petitioners' creditors under their plan. The Ninth Circuit's opinion does not tax the party that earned the income (the estate), but rather a party that received no benefit from the income, and that did not even own the property at the time it was sold (the individual).

In multiple contexts, courts of appeals have followed that principle, holding that administrative expense priority for taxes "incurred by the estate" applies to taxes incurred due to postpetition actions, when a bankruptcy "estate" comes into being. *In re L.J. O'Neill Shoe Co.*, 64 F.3d 1146, 1148 (8th Cir. 1995) (corporate income tax relating to income earned during bankruptcy case is entitled to administrative expense treatment); *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1301 (9th Cir. 1995) ("Because the estate was in existence on [the date the tax was incurred], we conclude that the corporate income taxes . . . were 'incurred by the estate.'"); *In re Columbia Gas Transmission Corp.*, 37 F.3d 982, 986 (3d Cir. 1994) ("the event giving rise to the property tax . . . occurred before the petition for bankruptcy had been filed" so were seventh priority, not administrative); *United States v. Friendship College, Inc.*, 737 F.2d 430, 432 (4th Cir. 1984) (administrative expense claim for income tax withheld from wages during Chapter 11 operations). As explained by the Fourth Circuit in *Friendship College*, "incurred by the estate" in the

bankruptcy tax context means postpetition tax liabilities, "since by definition there can be no bankruptcy estate until the petition in bankruptcy is filed." 737 F.2d at 431; *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447-48 (2004) (noting that the bankruptcy "estate" is the fundamental *res* underlying bankruptcy *in rem* jurisdiction). Because the Ninth Circuit's opinion concludes that Chapter 12 estates cannot incur taxes under IRC § 1399, and IRC § 1399 applies to Chapter 11 cases, all of these cases directly conflict with the opinion below.

II. Bankruptcy Taxation is Important, Especially in Farm Bankruptcy Cases.

A. The Constitution Requires Uniform Application of the Internal Revenue Code With the Bankruptcy Code.

The Bankruptcy Code should be interpreted uniformly across the country, without variance by circuit. *See New York v. Saper*, 336 U.S. 328, 328 (1949) (granting certiorari to resolve conflict between courts of appeals regarding an "issue of considerable practical importance in the administration of the Bankruptcy Act"). So should the Internal Revenue Code. *See Dobson v. Comm'r*, 320 U.S. 489, 492 (1943) (granting certiorari where issue was "important to tax administration" and split of authority existed). With the advent of the circuit split at issue here, neither Code is being interpreted uniformly, which creates significant problems in the administration of both. The IRS must apply different rules in different circuits, and so

must bankruptcy courts. This is not only unfair to debtors in various circuits, but gives rise to substantial litigation as bankruptcy courts and appellate courts around the country guess which interpretation this Court will adopt, and apply the Ninth Circuit's reasoning to other types of bankruptcy cases. Until this split is resolved, bankruptcy courts and debtors, especially family farmer-debtors, face difficulty and uncertainty in planning the reorganization of their farming operations and other businesses. In circuits without decisions, the significant litigation burden can also be an impediment to the reorganization process.

The disparate treatment of family farmers in America due to the circuit split is not only of serious practical importance, it is an issue of constitutional magnitude. The framers of the Constitution believed that uniform taxation was of such critical importance that they enshrined it in the Nation's charter. *See* U.S. CONST. art. I, § 8, cl. 1 (taxes must be "uniform throughout the United States"); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916) (noting that Uniformity Clause applies to income taxes); Jeffrey S. Kinsler, *Circuit-Specific Application of the Internal Revenue Code: An Unconstitutional Tax*, 81 DENV. U. L. REV. 113 (2003) (arguing that when circuit courts interpret federal tax statutes such that the IRS must impose different taxes on the residents of different states, the Uniformity Clause of the Constitution is violated).

If the Ninth Circuit's ruling is permitted to stand, the IRS must apply different rules in different states.

A family farmer in Montana who seeks the protection of Chapter 12 of the Bankruptcy Code and then sells livestock, a tractor, or the entire family farm will have to pay taxes incurred as a result of the sale in full while trying to meet obligations of the Chapter 12 plan. But a family farmer in South Dakota who sells the very same kinds of assets as the Montana farmer would be able to pay less than the full amount of the taxes arising from the sale under his reorganization plan, even though the two farms might be only a few miles apart. Likewise, a family farmer in a circuit without a circuit ruling cannot divine whether post-petition transactions will qualify for treatment under Section 1222(a)(2)(A). And again, this disparate treatment is not limited to Chapter 12 bankruptcies. As Ninth Circuit courts follow the opinion below in other non-individual Chapter 7 and 11 cases, the constitutionally-prohibited disparity will widen.

B. Chapter 12 Cases Are Increasing.

This Court has previously recognized that certiorari is justified in cases involving matters of importance to the agricultural community. *See Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978). Over the past three years, Chapter 12 bankruptcy filings have more than doubled, increasing from 332 in the twelve-month period ending September 30, 2008 to 707 in the twelve-month period ending September 30, 2010. *See* Administrative Office of the U.S. Courts, U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of

the Bankruptcy Code, During the Twelve Month Period Ended Sep. 30, 2010, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/0910_f2.pdf; Administrative Office of the U.S. Courts, U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the Twelve Month Period Ended Sep. 30, 2008, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2008/0908_f2.pdf.

Given the state of the national economy, family farmers are increasingly turning to Chapter 12 for relief, and the issue in this case will continue to recur. *See* Roger A. McEowen, *Agricultural Law Developments Shaping the Sector and Legal Practice*, 14 DRAKE J. AGRIC. L. 1, 17 (2009) ("[C]urrent indications are that bankruptcy practice will rise in significance for agricultural lawyers."). Indeed, the issue in this case is already creating substantial litigation in areas of the country where family farms are concentrated. *See In re Knudsen*, 389 B.R. 643 (Bankr. N.D. Iowa 2008); *In re Dawes*, 415 B.R. 815 (D. Kan. 2009); *In re Dawes*, 382 B.R. 509 (Bankr. D. Kan. 2008); *In re Gartner*, 2008 WL 5401665 (Bankr. D. Neb. Dec. 29, 2008); *In re Rickert*, 2008 WL 5401663 (Bankr. D. Neb. Dec. 29, 2008); *In re Uhrenholdt*, 2009 WL 198966 (Bankr. D. Neb. 2009); *In re Schilke*, 379 B.R. 899 (Bankr. D. Neb. 2007); *In re Schilke*, 2008 WL 4224279 (D. Neb. 2008); USDA, America's Diverse Family Farms: Assorted Sizes, Types, and Situations,

at 6, http://www.ers.usda.gov/publications/aib769/aib769.pdf (showing high concentration of farms around the midsection of the country).

A decision by this Court is the only way to resolve the circuit split, and is needed sooner rather than later, given the rapidly increasing significance of the issue to the agricultural community. There is no reason for this issue to percolate in the courts below because the split is irreconcilable. The issue has already been thoroughly considered by the Eighth and Ninth Circuits, and the other courts of appeals will merely line up behind *Knudsen* or the opinion below. The Court should grant review now. *See Laing v. United States*, 423 U.S. 161, 167 (1976) (granting certiorari to resolve issue where circuit split was irreconcilable and issue was recurring).

III. The Opinion Below Is Wrong.

A. The Ninth Circuit's Ruling Eviscerates Bankruptcy Code § 1222.

Chapter 12 was enacted to aid family farmers in successfully reorganizing their affairs. *See* H.R. Conf. Rep. No. 958, 99th Cong., 2d Sess. 48 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5246, 5249 ("[Chapter 12] is designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land."); *Flores v. Rios*, 36 F.3d 507, 510 (6th Cir. 1994) (noting that Chapter 12 represents federal policy intended to "benefit the oft-beleaguered family farmer").

Bankruptcy Code § 1222(a)(2)(A) is a particular application of that general policy. *Schilke*, 2008 WL 4224279, at *4 (D. Neb. 2008); 7 William L. Norton, *Norton Bankruptcy Law & Practice* § 122:10 (3d ed. 2010) ("This provision is designed to allow the farmer to modify the farming operation without regard to the tax consequences of the dispositions of farm assets."); Arthur Boelter, *Merstens Law of Federal Income Taxation* § 54:61 (Updated Dec. 2010) (noting that § 1222(a)(2)(A) is intended to "facilitate farmers' use of Chapter 12"). Prior to the enactment of Bankruptcy Code § 1222(a)(2)(A), the IRS would often have a veto over a debtor's plan of reorganization, because taxes owed to the IRS from bankruptcy estate asset sales qualify as administrative expenses entitled to full payment. Since many Chapter 12 debtors were unable to pay the taxes in full, Congress added Bankruptcy Code § 1222(a)(2)(A) to permit payment in less than full, which would allow family farmers to confirm plans of reorganization and sometimes even retain their farms. *See Dawes*, 415 B.R. at 820 ("In adopting this section, Congress was concerned that if the debtor/farmer could not pay the I.R.S. in full, the I.R.S. was likely to veto the plan, and the farmer would likely lose the farm."); *Dawes*, 382 B.R. at 519 ("The entire purpose of Chapter 12 is to allow a farmer to reorganize, and the specific purpose of the amendment to § 1222 was to remove a major impediment to reorganization."); 7 *Norton Bankruptcy Law & Practice* § 133:6 n.2 (3d ed. 2010).

Thus, the entire purpose of enacting Bankruptcy Code § 1222(a)(2)(A) was to deal with problems resulting from the fact that tax claims are normally entitled to priority. Yet the IRS now argues that these kinds of claims were never entitled to priority in the first place. In agreeing with the IRS, the Ninth Circuit effectively bestowed nondischargeable status upon postpetition tax claims by concluding that they must be paid outside the plan of reorganization. The opinion below therefore accomplishes the exact opposite effect of what was intended by Bankruptcy Code § 1222(a)(2)(A). In fact, the IRS now has even more leverage over Chapter 12 debtors than it did before Congress enacted § 1222(a)(2)(A) because its tax claim may not even be dealt with through the bankruptcy plan.

Even the Ninth Circuit acknowledged in the opinion below that its decision was contrary to the purpose of Bankruptcy Code § 1222(a)(2)(A). Pet App. 15-16. When an interpretation of a statute is "demonstrably at odds with the intentions of its drafters," then the court should give effect to congressional intent. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 243 (1989). The legislative history surrounding the enactment of § 503(b)(1)(B)(i) is consistent with *Knudsen* and contrary to the Opinion below. The bankruptcy court in *Dawes* canvassed the relevant history, and noted that the Senate Reports relating to Bankruptcy Code § 503(b)(1)(B)(i) referred to taxes incurred "during the administration of the estate" or "in administering the debtor's estate," as constituting

administrative expenses under § 503(b)(2), which supports the *Knudsen* view of Bankruptcy Code § 1122(a)(2)(A). *See Dawes*, 382 B.R. at 515-16; *Knudsen*, 581 F.3d at 708-09.

The Internal Revenue Code determines what taxes are to be assessed and Bankruptcy Code § 503 determines the priority treatment of taxes and other claims in bankruptcy cases. The IRS is given priority treatment under Bankruptcy Code § 503 for nearly all taxes because it "cannot choose its debtors or take advance security on tax debts." *See In re Flo-Lizer, Inc.*, 916 F.2d 363, 366 (6th Cir. 1990). Taxes incurred during administration of the bankruptcy estate have senior priority along with other costs of administration. The policy underlying the Bankruptcy Code's treatment of administrative expenses is that "a debtor's efforts to reorganize shall be financed by the debtor, not the debtor's post-petition creditors." *See In re Allied Mech. Servs.*, 885 F.2d 837, 839 (11th Cir. 1989). The opinion below applied the Internal Revenue Code without giving due regard to these fundamental principles and the finely wrought structure of the Bankruptcy Code, an error which is particularly manifest given Congress's later enactment of Bankruptcy Code § 1222(a)(2)(A).

Congress enacted IRC § 1399 in 1980, and enacted Bankruptcy Code § 1222(a)(2)(A) in 2005. Section 1222(a)(2)(A) is more recent, more specific, and provides the exclusive method for treatment of claims owed to government entities relating to the sale of farm assets. "[A] specific policy embodied in a later

federal statute should control [the] construction of the [earlier] statute, even though it ha[s] not been expressly amended." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)). "The 'judicial task of reconciling many laws enacted over time, and getting the laws to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988). Congress intended to permit the discharge of federal tax claims from the sale of farm assets and make it easier for family farmers to confirm a plan of reorganization and keep their farms. The Ninth Circuit failed to effectuate the policy clearly embodied in Bankruptcy Code § 1222(a)(2)(A), and accorded undue weight to IRC § 1399.

B. The Ninth Circuit's Analysis Does Not Support its Distinction from Other Bankruptcy Tax Cases, or the Divisions it Creates.

Notably, and contrary to what the Ninth Circuit held, IRC § 1399 does not say that a Chapter 12 (and a non-individual Chapter 11 and Chapter 7) bankruptcy estate is not a taxable entity – it says that the filing of a Chapter 12 petition does not create a *separate* taxable entity. And IRC § 1399 never even uses the word "estate." The Ninth Circuit rewrote the statute, replacing the word "entity" with "estate,"

despite the fact that the two words are entirely different. *See Abbott v. Abbott*, ___ U.S. ___, ___, 130 S. Ct. 1983, 2003 (2010) ("In interpreting statutory text, we ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning.").

The Eighth Circuit in *O'Neill* recognized that under the IRC, no separate taxable entity results from commencement of a corporate bankruptcy. *Id.* at 1151. But it explained that the debtor is taxed as a continuous corporate entity, and the Bankruptcy Code determines the status as an administrative expense or lower priority depending on whether the taxes were incurred before or after the petition was filed. *Id.* at 1152. The Eleventh Circuit agreed in *United States v. Hillsborough Holdings Corp.*, 116 F.3d 1391, 1396 (11th Cir. 1997); *see also In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1301 (9th Cir. 1995) (same); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("[I]t is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing"). In other words, under IRC § 1399, the Debtor and the estate are *identical* for taxation purposes in Chapter 12 and most other contexts.

The Ninth Circuit referenced several Chapter 13 cases to support its conclusion. Chapter 13 cases are not analogous because Bankruptcy Code § 1305

provides a specific method for treating a postpetition tax claim in a plan of reorganization. The IRS has previously recognized this very point. *See* Internal Revenue Service Litigation Bulletin No. 448, January 1998, 1998 WL 1756362 ("Our position is that filing a post-petition claim under [Bankruptcy Code] § 1305 is the exclusive method of including a post-petition tax year in the plan. *Pacific-Atlantic*, *O'Neill Shoe*, and *Hillsborough Holdings* are, thus, distinguishable since section 1305 is inapplicable to those chapters."). The same rationale applies to Chapter 12, which likewise does not have a provision like § 1305. Instead, Bankruptcy Code § 1222(a)(2)(A) governs how both pre- and postpetition tax claims from farm asset sales are treated in a Chapter 12 plan of reorganization. *See* 4 *Collier on Bankruptcy* ¶ 503.07[2][a], at 503-62 (16th ed. 2010) (noting that like § 1305 in Chapter 13, Chapter 12 "has a unique provision that affects the treatment of certain postpetition tax claims, specifically section 1222(a)(2)(A)"). Consistent and coherent administration of tax claims arising in bankruptcy cases would accord administrative expense status to taxes arising from postpetition actions, and special treatment to the extent of special Bankruptcy Code provisions.

Farm assets are property of a farmer-debtor's bankruptcy estate. *See* 11 U.S.C. §§ 541(a), 1207. The income received from the sale of those assets is also property of the estate. *See* 11 U.S.C. § 541(a)(6), and § 1207(a). Under the opinion below, the Chapter

12 estate owns the farm assets and reaps the benefits of the sale of those assets to pay other creditors, while the debtor individually is burdened with the tax consequences of the sale. Yet Chapter 12 requires that debtor to "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C. § 1222(a)(1). How, then, is the Debtor to pay the tax claim? The Ninth Circuit's ruling effectively grants a postpetition tax claim from the sale of farm assets nondischargeable status, which is directly contrary to legislative intent. It forces family farmers to liquidate their assets during the tax year before bankruptcy, without creditor and court oversight, if they are to satisfy their taxes incurred as a result of such an asset sale under their plans.

The Ninth Circuit's notion that postpetition farm asset sales should receive less favorable treatment than prepetition sales is just as troubling. There is no logical reason why Congress would have made the petition filing date the cut-off for the applicability of Bankruptcy Code § 1222(a)(2)(A), and it is not found in the statutory language. On its face, Section 1222(a)(2)(A) does not distinguish between prepetition and postpetition claims. *See Knudsen*, 581 F.3d at 709. Rather, the plain meaning of Section 1222(a)(2)(A) is that it relieves the burdens of taxation relating to the sales of farm assets by altering the priority status such claims would otherwise enjoy

in the bankruptcy case, regardless of the time the tax was incurred. The Opinion below assumes that Congress intended the statute to apply only to farmers who were prescient enough to sell their farms before their creditors and the Bankruptcy Court could supervise the sale, and renders Bankruptcy Code § 1222(a)(2)(A) meaningless for most Chapter 12 debtors. Encouraging farmers to liquidate assets before filing bankruptcy petitions is inconsistent with the broader notion embodied in the Bankruptcy Code that orderly disposition of the bankruptcy estate under court supervision is in the best interests of all parties. Prepetition sales and prepetition disposition of sale proceeds often results in less money for creditors and gives rise to preferential transfer and fraudulent transfer issues, and sales are conducted without being held at public bankruptcy auctions that generate higher prices. *See* 3 *Collier on Bankruptcy* ¶ 363.02 (16th ed. 2010) ("[A] trustee normally would be expected to sell to the highest bidder at an auction. . . .").

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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617 F.3d 1161

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Appellant,
v.
Brenda HALL; Lynwood D. Hall, Appellees.

No. 08-17267.

Argued and Submitted Feb. 10, 2010.
Filed Aug. 16, 2010.

Patrick J. Urda, Tax Division, Department of Justice, filed the briefs and argued the cause for the appellant. John A. DiCicco, Acting Assistant Attorney General, and Bruce R. Ellisen, Tax Division, Department of Justice, were on the briefs. Diane J. Humetewa, United States Attorney, served as Of Counsel.

Clifford B. Altfeld, Altfeld Battaile & Goldman, P.C., Tuscon, AZ, filed the brief and argued the cause for the appellees. Eugene Vamos, Altfeld Battaile & Goldman, P.C., Tuscon, AZ, was on the brief.

Appeal from the United States District Court for the District of Arizona, David C. Bury, District Judge, Presiding. D.C. No. 4:07-cv-00679-DCB.

Before DIARMUID F. O'SCANNLAIN, STEPHEN S. TROTT and RICHARD A. PAEZ, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Dissent by Judge PAEZ.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether and to what extent debtors must pay federal income tax on the gain from the sale of their farm during bankruptcy proceedings.

I

A

Lynwood and Brenda Hall filed a petition under chapter 12 of the Bankruptcy Code, which governs family farmer bankruptcies, in August 2005. Shortly thereafter, the Halls moved to sell their farm for $960,000, which the bankruptcy court approved.

In December 2005, the Halls proposed a plan of reorganization, under which they sought to pay off their outstanding liabilities using the proceeds from the sale. The Internal Revenue Service ("IRS") objected to the proposed plan, asserting a federal income tax of $29,000 on the capital gain from the sale. The Halls then amended their proposed plan to treat the $29,000 tax as an unsecured claim to be paid "to the extent funds are available," with "the balance discharged." The IRS again objected.

B

The bankruptcy court sustained the IRS's objection. *In re Hall,* 376 B.R. 741 (Bankr.D.Ariz.2007). The district court reversed. *Hall v. United States* (*In*

re Hall), 393 B.R. 857 (D.Ariz.2008). The United States timely appealed.

II

The United States contends that the district court erred by reversing the bankruptcy court's decision to sustain the IRS's objection, asserting that the tax on the gain from the sale of a farm during bankruptcy is not dischargeable.

A

We begin, as always, with the text of the applicable statute. Chapter 12 of the Bankruptcy Code, 11 U.S.C. §§ 1201-31, allows family farmers and fishermen to reorganize their business affairs while keeping creditors at bay. But the benefits of this arrangement come with responsibilities. In chapter 12 bankruptcy cases, the debtor must file a plan of reorganization, *id.* § 1221, and the contents of that plan are prescribed in section 1222(a)(1)-(4). In particular, section 1222(a)(2)(A) states:

> The plan shall . . .
>
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 unless
>
> (A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the

> debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge. . . .

Thus debtors may well treat certain claims owed to a governmental unit arising from the sale of farm realty as payable in less than full, and dischargeable.

But, by its terms, subsection (2)(A) applies only to "claims entitled to priority under section 507 [of the Bankruptcy Code]." Section 507, in turn, lists numerous categories of claims that receive special treatment in bankruptcy. *Id.* § 507(a)(1)-(10). Two of the categories include taxes. The first such category, section 507(a)(8), includes various taxes incurred "on or before the date of the filing of the petition," *i.e.*, "prepetition." *E.g.*, *id.* § 507(a)(8)(A) (involving prepetition income taxes).[1] Indeed, there is no dispute

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[1] The other types of taxes enumerated in section 507(a)(8) also clearly are taxes incurred prepetition, *id.* § 507(a)(8)(B) ("property tax incurred before the commencement of the case"); *id.* § 507(a)(8)(D) ("employment tax on a wage . . . earned from the debtor before the date of the filing of the petition"); *id.* § 507(a)(8)(E)(i)-(ii) ("excise tax on . . . a transaction occurring before the date of the filing of the petition"); *id.* § 507(a)(8)(F)(i)-(iii) ("customs duty arising out of the importation of merchandise . . . before the date of the filing of the petition"); *id.* § 507(a)(8)(G) ("a penalty . . . for actual pecuniary loss" related to claims in (A) through (F)), with the exception of § 507(a)(8)(C)-involving so-called "trust fund taxes," *i.e.*, taxes withheld from employees-which does not include clear language

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that section 1222(a)(2)(A) allows chapter 12 debtors to treat *taxes* incurred by selling farm assets *before* the filing of a bankruptcy petition as payable in less than full and dischargeable: a tax incurred prepetition is a claim "entitled to priority under section 507" by way of section 507(a)(8). Here, by contrast, the tax was incurred *after* the filing of the petition, *i.e.*, "postpetition."

The second category that includes taxes, section 507(a)(2), consists of "administrative expenses allowed under section 503(b)." *Id.* § 507(a)(2). This provision arguably includes the tax on the gain from the sale of the farm because section 503(b), which is cross-referenced by section 507(a)(2), allows for "administrative expenses . . . including . . . any *tax* . . . incurred by the estate." *Id.* § 503(b)(1)(B)(i) (emphasis added).

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limiting its reach to prepetition taxes. That absence has been interpreted, however, as indicating that "trust fund taxes" receive priority regardless of the amount of time that they predate the petition, unlike the other types of taxes listed in § 507(a)(8), *e.g.*, *Shank v. Wash. State Dep't of Revenue* (*In re Shank*), 792 F.2d 829, 831 (9th Cir.1986); *In re Official Comm. of Unsecured Creditors of White Farm Equip. Co.*, 943 F.2d 752, 756 (7th Cir.1991), and not as indicating that § 507(a)(8)(C) applies to postpetition taxes. *Collier on Bankruptcy* ¶ 507.11[1] (15th ed. 2009) ("An eighth priority is granted under section 507(a)(8) to . . . certain kinds of prepetition taxes [including] trust fund taxes."); *id.* ¶ 507.11[4] ("[I]n contrast to all of the other portions of section 507(a)(8), there is no time limit applicable to trust fund taxes."). In any event, this case does not involve "trust fund taxes."

Which, of course, raises the question whether the post-petition tax on the sale of the farm at issue in this case was "incurred by the estate." We are satisfied that the answer is no. The Internal Revenue Code provides that a chapter 12 estate cannot incur taxes. Title 26 U.S.C. § 1399 states that "no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code" – the bankruptcy title – "[e]xcept in any case to which section 1398 applies." Section 1398 applies only to "any case under chapter 7 (relating to liquidations) or chapter 11 (relation to reorganizations) of title 11 of the United States Code in which the debtor is an individual." 26 U.S.C. § 1398. It follows that a chapter 12 estate is not a taxable entity.

Since the chapter 12 estate is not a taxable entity, the chapter 12 estate cannot "incur" a tax. We agree with those courts that have reached the same conclusion for the same reason with respect to chapter 13 estates, which are treated identically to chapter 12 estates by sections 1398 and 1399. *In re Whall,* 391 B.R. 1, 5-6 (Bankr.D.Mass.2008); *In re Brown,* 2006 WL 3370867, *3 (Bankr.D.Mass. Nov.20, 2006); *In re Gyulafia,* 65 B.R. 913, 916 (Bankr.D.Kan.1986). Because a chapter 12 estate cannot "incur" a tax, it cannot get the benefit of section 1222(a)(2)(A), which provides that the tax on the gain from the sale of a farm during bankruptcy is dischargeable and payable in less than full.

We recognize that our conclusion that the chapter 12 estate cannot "incur" a tax necessarily implies that

the debtor is responsible for any taxes incurred after the bankruptcy petition is filed in a chapter 12 case because the chapter 12 trustee, the only other potentially responsible party, is not liable for the tax. Section 1398 provides that in chapter 7 and individual chapter 11 cases, where there can be "taxable income of the estate," any "tax . . . shall be paid by the trustee." 26 U.S.C. § 1398(c)(1). The omission of any provision in the U.S.Code requiring the trustee to pay taxes in cases to which section 1398 does not apply, such as chapter 12 cases, implies that the trustee does not pay taxes in such cases. *In re Lindsey,* 142 B.R. 447, 448 (Bankr.D.Okla.1992) ("It is clear that, pursuant to 26 U.S.C. § 1398 and 1399, the standing Chapter 12 trustee neither files a return nor pays federal income tax. . . ."). That makes sense: since the chapter 12 estate is not a taxable entity and thus there cannot be "taxable income of the estate," 26 U.S.C. § 1398(c)(1), and the debtor remains in possession in chapter 12 bankruptcy absent extraordinary circumstances, 11 U.S.C. § 1203, the trustee is not associated with any taxes. *See Holywell Corp. v. Smith,* 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992) (shifting tax burden to trustee in corporate chapter 11 case because chapter 11 bankruptcy created a separate entity overseen by the trustee).[2]

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[2] To be clear, we do not hold that the postpetition tax here is payable in full because of section 1222(a)(2)'s full payment rule for claims treated by the plan. That would be inconsistent with our conclusion that the postpetition tax here does not qualify for

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B

The Halls primarily rely on *Knudsen v. IRS*, 581 F.3d 696 (8th Cir.2009), in which chapter 12 debtors proposed a plan to sell farmland and farm equipment to fund their reorganization. Like the case before us, the plan treated the income taxes arising from these postpetition sales as unsecured claims under section 1222(a)(2)(A) and thus dischargeable. *Id.* at 701. The IRS objected there as well. *Id.* But the Eighth Circuit ruled for the debtors, holding that "§ 1222(a)(2)(A) applies to the *postpetition* sale of farm assets," so that the taxes arising from such sale could be treated as unsecured claims and dischargeable. *Id.* at 710 (emphasis added). In its view, the taxes arising from the postpetition sale met the requirement in section 1222(a)(2)(A) that they be a "claim[] entitled to priority under section 507." *Id.* at 708-09. Specifically, the court held that the taxes fell under section

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the section 1222(a)(2)(A) exception to the full payment rule on the ground that the tax does not fall within section 507. Rather, the tax is payable in full because it is incurred and owed by the debtor outside of the plan, as discussed in the text accompanying this footnote. It is of no matter that the debtors attempted to include the tax in their plan, because the Bankruptcy Code places limits on the liabilities a plan may address. Chapter 12 plans bind "each creditor," 11 U.S.C. § 1227, and a "creditor" is defined, in relevant part, as "an entity that has a claim against the debtor that *arose at the time of or before the order for relief* concerning the debtor." 11 U.S.C. § 101(10)(A) (emphasis added). Because the tax in this case arose after the order for relief, *i.e.*, the automatic stay that commences upon the filing of a bankruptcy petition, 11 U.S.C. § 301(b), the debtors cannot avoid the tax simply by listing it in their proposed plan.

507(a)(2) as administrative expenses because they satisfied the relevant definition of administrative expenses in section 503(b) – "tax . . . incurred by the estate" – which means merely "tax . . . incurred post-petition." *Id.* at 708-09. The court expressly declined to give weight to Internal Revenue Code sections 1398 and 1399 when interpreting the phrase "tax . . . incurred by the estate," and took comfort in the fact that the Bankruptcy Code did not indicate that a chapter 12 estate could not incur taxes. *Id.* at 708-10.[3] We are not persuaded.

1

The Halls first argue, relying on the cases collected by *Knudsen,* 581 F.3d at 709, that "incurred by the estate" in section 503(b) means "incurred post-petition." In their view, it does not matter whether the estate can incur a tax because the key is when the tax was incurred.

It is true that the cases the Halls and *Knudsen* cite state that all taxes "incurred by the estate" are "incurred postpetition." They must: because an estate does not exist until after a bankruptcy petition is filed, any taxes an estate incurs are necessarily incurred postpetition. But just because all apples are

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[3] The Tenth Circuit Bankruptcy Appellate Panel recently agreed with the Eighth Circuit's decision in *Knudsen* without further analysis. *IRS v. Ficken* (*In re Ficken*), 430 B.R. 663, 670-72 (10th Cir. BAP 2010).

fruits does not mean all fruits are apples. Likewise, although all taxes "incurred by the estate" are "incurred post-petition," not all taxes "incurred post-petition" are "incurred by the estate." The cases the Halls and *Knudsen* cite simply do not support the Halls' view, as a close reading of the language in the cases indicates. *See, e.g., W. Va. State Dep't of Tax & Revenue v. IRS* (*In re Columbia Gas Transmission Corp.*), 37 F.3d 982, 984 (3d Cir.1994) ("The priority for taxes 'incurred by the estate' extends *only* to taxes 'incurred' postpetition." (emphasis added)); *In re Ne. Ohio Gen. Hosp. Ass'n,* 126 B.R. 513, 515 (Bankr.N.D.Ohio 1991) ("Taxes incurred by the estate are administrative expenses pursuant to Section 503(b)(1)(B)(i). Because the estate does not exist prepetition, priority treatment is *limited* to taxes incurred post-petition." (emphasis added)).[4]

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[4] We note that the United States is incorrect that these cases are distinguishable on the ground that they involve chapter 11, as opposed to chapter 12, because these cases involve *corporate* chapter 11 debtors, as opposed to *individual* chapter 11 debtors. Sections 1398 and 1399 of the Internal Revenue Code treat corporate chapter 11 debtors and chapters 12 and 13 debtors the same. 26 U.S.C. § 1398 ("apply[ing] to any case under chapter 7 . . . or chapter 11 . . . in which the debtor is an *individual*") (emphasis added); *id.* § 1399 ("Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a [bankruptcy] case. . . .").

The Halls next argue, again relying on *Knudsen*, 581 F.3d at 709, that the fact that a bankruptcy estate exists and can hold property means that it can incur taxes. Although the Halls admit that sections 1398 and 1399 of the Internal Revenue Code state a contrary view by classifying only certain estates in certain chapters as taxable entities, they believe all estates, regardless of the chapter under which they exist, can incur taxes. The Halls argue that the *Internal Revenue* Code should not be used to "frustrate" the *Bankruptcy* Code because Congress was not aware of the relevance of the former when drafting the latter.

We disagree. Neither the Halls nor *Knudsen* cites any provision in chapter 12 stating that a bankruptcy estate has the inherent ability to incur taxes. That is because there is none. *Knudsen* quotes section 1207 of the Bankruptcy Code to support its view indirectly. 581 F.3d at 710. But that section merely includes as property of the estate whatever the debtor acquires postpetition. It does not contain the slightest suggestion that the ability to retain property implies the ability to incur taxes. Nor do the Halls or *Knudsen* cite any authority for the proposition that the Bankruptcy Code as a whole indicates that all estates, regardless of chapter, have the inherent ability to incur taxes. That is because the code does not institute a singular concept of the bankruptcy estate regardless of chapter. In fact, the concept of the bankruptcy estate in the Bankruptcy Code is so

amorphous that even such basic details as the contents of the estate vary within the code depending on the chapter,[5] and within chapters depending on the nature of the debtor.[6]

In any event, we must read the United States Code as a whole. Title 26 U.S.C. §§ 1398 and 1399 indicate that a chapter 12 bankruptcy estate cannot incur taxes. It does not matter that these sections appear in the Internal Revenue Code as distinguished from the Bankruptcy Code. We are to "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). In fact, we need not even risk the error of such assumption in this case because Congress has indicated repeatedly that it is aware that the taxable entity provisions in the Internal Revenue Code are relevant to the Bankruptcy Code. At the same time Congress enacted Bankruptcy Code section 503(b), it also enacted section 346, which deals with the relationship between the Internal Revenue Code's taxable entity provisions and state and local taxes. *See* Pub.L. No. 95-598, § 346, 92 Stat. 2549 (1978) (enacting § 346);

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[5] *Compare* 11 U.S.C. § 541 (outlining general rules for property of estate), *id.* §§ 721-28 (outlining specific rules for chapter 7), *id.* § 1115 (same for chapter 11), *and id.* § 1207 (same for chapter 12), *with id.* § 1306 (same for chapter 13).

[6] *Compare id.* § 541 (outlining general rules for property of estate, applicable to corporate chapter 11 debtors), *with id.* § 1115 (outlining rules for property of estate for individual chapter 11 debtors).

id. § 503 (enacting § 503(b)). Similarly, at the same time Congress enacted Bankruptcy Code section 1222(a)(2)(A), it also amended section 346. *See* Pub.L. No. 109-8, § 1003(a), 119 Stat. 23 (amending § 1222(a)(2)(A)); *id.* § 719 (amending § 346). We are thus justified in relying on Internal Revenue Code sections 1398 and 1399, which specifically deal with taxation in bankruptcy.

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The Halls last rely on *Knudsen* for an argument by omission. They argue that the fact that section 1222(a)(2)(A) does not restrict itself to prepetition taxes by its express terms is significant. *See Knudsen*, 581 F.3d at 709. But that is irrelevant because the cross-references in section 1222(a)(2)(A) itself clearly lead us to the provisions that restrict their reach. *Knudsen* fails to persuade us of the Halls' view and we decline to follow it.

C

The Halls also appeal to legislative history. They first note that the Senate Report on section 503(b) states that "*administrative expenses include taxes which the trustee incurs* in administering the debtor's estate, including taxes on capital gains from sales of property by the trustee and taxes on income earned by the estate *during the case.*" S.Rep. No. 95-989, at 66 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5852 (emphasis added). This language, they press, implies

that the tax in this case was "incurred by the estate." The Halls also cite the statement of a senator speaking in favor of an unenacted provision similar to section 1222(a)(2)(A), proposed six years before that section's enactment. That senator stated that the unenacted provision was aimed at situations in which "the I.R.S. must be paid in full for any tax liabilities generated during a bankruptcy reorganization." 145 Cong. Rec. S7520-02, 1999 WL 20426 (Jan. 20, 1999) (statement of Sen. Grassley).

But we cannot ignore clear statutory text because of legislative floor statements. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Although we are sympathetic to the approach outlined by Senator Grassley, the operative language simply failed to make its way into the statute. This is confirmed when the statutory scheme is read as a whole. *Milavetz, Gallop & Milavetz, P.A. v. United States*, ___ U.S. ___, 130 S.Ct. 1324, 1332 n. 3, 176 L.Ed.2d 79 (2010); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). When we trace section 1222(a)(2)(A)'s cross-references and consider the Internal Revenue Code provisions relevant to the cross-referenced sections, it is evident to us that, as enacted, it does not apply to the postpetition tax at issue in this case. Recourse to "legislative history is unnecessary in light of the

statute's unambiguous language." *Milavetz,* 130 S.Ct. 1324, 1332, n. 3.

Even if we were to consult legislative history, the statements the Halls cite are not persuasive. With respect to the Senate Report on section 503(b), the subject of the phrase the Halls quote is "trustee." S.Rep. No. 95-989, at 66. The trustee, of course, is the individual who acts on behalf of the estate. 11 U.S.C. § 323(a). When the estate acts, it is the trustee who is acting. Thus, the Senate Report's phrase "taxes which the trustee incurs" has the same meaning as the phrase "taxes which the estate incurs." This latter phrase is merely a rewording of the language in section 503(b) itself, that is, taxes "incurred by the estate."

In any event, the Supreme Court has warned us against attributing the views of one Congress to another Congress, *Massachusetts v. EPA,* 549 U.S. 497, 529-30, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), and against relying on interpretations of bills Congress rejects, *Doe v. Chao,* 540 U.S. 614, 615, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004). Here, the statement on which the debtors rely concerns an unenacted bill in a Congress convened six years prior to the one that enacted the section at issue in this case. Even if appeal to legislative history were appropriate, we are reluctant to afford it significant weight here.

It may well be that the drafter's intention for section 1222(a)(2)(A) differs from its text. *Hall,* 376

B.R. at 746; *see Collier on Bankruptcy* ¶ 503.07[2][a][i] (15th ed.2009) (speculating that the intent behind section 1222(a)(2)(A) might diverge from its "wording"); *id.* ¶ 1222.02[2] (speculating that the "intent" behind section 1222(a)(2)(A) might diverge from the application of its text); Roger McEowen, *Chapter 12 Bankruptcy Taxation: Did BAPCPA Really Change Tax Claims to Unsecured General Creditor Status?*, at 2, Sept. 16, 2009, http://www.calt.iastate.edu/bapcpa.html (noting disparity between text and intent in section 1222(a)(2)(A)). But it is our duty to follow the text because the text is the law. Congress is entirely free to change the law by amending the text.

REVERSED.

PAEZ, Circuit Judge, dissenting:

I respectfully dissent. After careful consideration of the majority's analysis of the relevant bankruptcy code and IRS code provisions, I am not persuaded that § 1222(a)(2)(A) does not entitle the debtors to treat the capital gains taxes arising from the post-petition sale of their farm assets as an unsecured claim not entitled to priority under § 507. In my view, Congress's intent was clear: it wanted to help family farmers keep their farms by allowing them to sell farm assets to pay off debts without being liable for the full amount of any capital gains tax arising from the sale, regardless of whether they sold the assets before or after filing their Chapter 12 petition.

Rather than follow the course proposed by the majority, I would follow the reasoning of the Eighth Circuit in *Knudsen v. IRS*, 581 F.3d 696 (8th Cir.2009), and the Tenth Circuit Bankruptcy Appellate Panel's recent decision in *In re Ficken*, 430 B.R. 663 (10th Cir. BAP 2010), to conclude that capital gains taxes arising from the post-petition sale of farm assets are dischargeable under the § 1222(a)(2)(A) exception. This approach would honor Congress's clear intent and avoid an unwarranted circuit split.

393 B.R. 857

United States District Court,
D. Arizona.
In re Lynwood D. HALL and Brenda A. Hall, Debtors.
Lynwood D. Hall, Brenda Hall, Appellants,
v.
United States of America, Appellee.
No. CV-07-679-TUC-DCB.
Bankruptcy No. 05-4423-TUC-EWH.
BAP No. 07-1441.

Aug. 6, 2008.

Clifford B. Altfeld, Altfeld Battaile & Goldman, P.C., Tucson, AZ, for Debtors.

Alan R. Costello, Costello Law Firm, Phoenix, AZ, for trustee.

ORDER

David C. BURY, District Judge.

This is an appeal from a bankruptcy decision, pursuant to 28 U.S.C. § 158(a)(1), entered in *In re Hall,* BK-05-4423-TUC-EWH.

FACTUAL AND PROCEDURAL BACKGROUND

The Bankruptcy Court in *In re Hall,* 376 B.R. 741 (Bankr.D.Ariz.2007), held that because a Chapter 12 estate is not a separate taxable entity, it cannot incur a federal capital gains tax liability arising from the postpetition sale of farm assets and, therefore, such

liability is not a claim entitled to priority which may be denied full payment under a Chapter 12 plan and treated as an unsecured claim that is not entitled to priority.

The Debtors are family farmers whose bankruptcy filing was governed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) and 11 U.S.C. § 1222(a)(2)(A). After the filing, the Bankruptcy Court granted Debtors' motion to sell their 320-acre farm for the sum of $960,000. The sale of the farmland generated a capital gains tax of about $29,000. Debtors' plan proposed to include that tax liability as an unsecured claim, which would be paid in full to the extent that funds were available; otherwise it would be paid pro rata with the other similarly situated claims, and the balance discharged. Relying on *In re Knudsen,* 356 B.R. 480 (Bankr.N.D.Iowa 2006), *aff'd in part and rev'd in part,* 389 B.R. 643 (N.D.Iowa 2008), the Debtors argued that, under § 1222(a)(2)(A), taxes generated by the sale of farming assets are treated as unsecured debt and are not entitled to priority if the debtor receives a discharge.

The Bankruptcy Court rejected the conclusion in *Knudsen* and agreed with the Bankruptcy Court in *In re Brown,* 2006 WL 3370867 (Bankr.D.Mass.2006). The Bankruptcy Court noted that, under § 1222(a)(2)(A), a Chapter 12 plan must provide for the full payment, in deferred cash payments, of all claims entitled to priority under 11 U.S.C. § 507 unless the claim is owed to a governmental unit and arises out of the

disposition of any farm asset used in the debtor's farming operation, in which case the claim must be treated as a nonpriority unsecured claim. This provision applies only if a debtor receives a discharge. The Bankruptcy Court said that, under the plain language of § 1222(a)(2), in order to qualify for treatment as an unsecured claim, the claim must fall within one of the priority categories in § 507. The only two potential categories under which taxes on a postpetition sale might fall are if the tax is an administrative expense (§ 507(a)(2)) or is an allowed unsecured claim of a governmental unit (§ 507(a)(8)).

The Bankruptcy Court went on to find that Section 507(a)(8) did not apply because that section applies exclusively to claims that arise from taxes owed prepetition. Further, § 507(a)(2) did not apply because it identifies as a priority administrative expenses allowed under section 503(b). In order for a tax to qualify as an administrative expense under § 503(b)(1)(B)(i), the tax must be incurred by the estate and not be a tax of a kind specified in § 507(a)(8). The question was whether the capital gains tax arising from the postpetition sale of the farmland is a tax "incurred" by the estate. The Bankruptcy Court agreed with the Internal Revenue Service (IRS) that the taxes in this case were not incurred by the estate because a Chapter 12 estate is not a separate taxable entity, and it cannot incur a tax liability constituting an administrative expense. *See* 26 U.S.C.A. §§ 1398, 1399.

Further, the Bankruptcy Court found that there is no provision for filing a claim for postpetition taxes in a Chapter 12 bankruptcy. The Court read Section 503(b)(1)(B)(i)in conjunction with §§ 1398 and 1399 of the Internal Revenue Code and resolved that there is no separate taxable entity created when an individual commences a case under Chapter 12. Consequently, the capital gains tax arising from the postpetition sale of the farmland cannot be a tax incurred by the Chapter 12 estate under § 503(b)(1)(B)(i). Because the postpetition capital gains tax is not entitled to priority under § 507, it does not fall within the exception carved out by § 1222(a)(2)(A), which creates an exception for priority claims arising from the prepetition sale, transfer, or exchange of farm assets. Because the taxes did not qualify as an administrative expense under § 503(b) and were not entitled to priority under § 507, they did not fall within the purview of the § 1222(a)(2)(A) exception and could not be treated as an unsecured claim that is not entitled to priority. The Bankruptcy Court sustained the IRS's objection to the Debtors' Chapter 12 plan.

On December 21, 2007, the Debtors filed an appeal from the Bankruptcy Court's decisions entered October 3, 2007 and November 20, 2007. On February 21, 2008, Debtors/Appellants' opening brief was filed. On February 21, 2008, Appellee USA's brief was filed. On March 5, 2008, Appellee State of Arizona's brief was filed. On March 7, 2008, Debtors/Appellants' reply brief was filed. On May 12, 2008, oral argument

was presented to the Court by the parties and the matter was taken under advisement.

STANDARD OF REVIEW

There are no questions of fact. The issue on appeal is an issue of law and is subject to de novo review by the District Court. *See In re Olshan,* 356 F.3d 1078, 1083 (9th Cir.2004); *In re Price,* 353 F.3d 1135, 1138 (9th Cir.2004); *In re Summers,* 332 F.3d 1240, 1242 (9th Cir.2003). The Bankruptcy Court's interpretation of the bankruptcy code is reviewed *de novo* by the District Court. *See In re DeVille,* 361 F.3d 539, 547 (9th Cir.2004).

ISSUE

The issue to be resolved is whether or not, in a Chapter 12 bankruptcy, "the taxes incurred from the post-petition sale of a debtor's real property that is used in farming may be treated as a liability of the estate and discharged under 11 U.S.C. 1222(a)(2)(A) or whether the debtor in a Chapter 12 bankruptcy is personally liable for taxes incurred from the post-petition sale of farming real property." (Debtor's Opening Brief at 2.)

DISCUSSION

As indicated by the Court during oral argument, the Court continues to be inclined in favor of the Debtors' position and does find that, as in *In re*

Knudsen, 389 B.R. 643 (N.D.Iowa 2008), *In re Dawes,* 382 B.R. 509 (Bankr.D.Kan.2008), and *In re Schilke,* 379 B.R. 899 (Bankr.D.Neb.2007) (all Chapter 12 family farmer bankruptcies addressing the same issue as presented herein), the Halls may treat post-petition income taxes incurred from the post-petition sale of their farm as a liability of the estate, dischargeable under § 1222, and the plan may propose payment of such expenses by the estate. This Court is not persuaded by an application of the analysis and holding in *In re Brown,* 2006 WL 3370867 (Bankr.D.Mass.2006), a chapter 13 bankruptcy which did not address § 1222 and applied an IRS interpretation of bankruptcy policies.

Appellants contend that the Congress intended to offer relief to the farmer by the amendment and inclusion of § 1222(a)(2)(A), which is supported by a reading of the legislative history of this amendment, as follows:

> Chapter 12. Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income
>
> § 1222. Contents of plan
>
> (a) The plan shall –
>
> * * *
>
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge.

Claims entitled to priority as described in Section 507, are as follows:

(a) The following expenses and claims have priority in the following order:

* * *

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

* * *

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for –

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition –

The *Hall* decision specifically found, as follows,

Perhaps Congress meant to provide relief for postpetition taxes, but that is not what the statute provides. "It is well established that 'when the statute's language is plain, the

> sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. United States Trustee,* 540 U.S. at 534[, 124 S.Ct. 1023] (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)) (other citations omitted). In this case, the disposition of the text is not absurd: as written, § 1222(a)(2)(A) creates an exception for priority claims arising from the *prepetition* sale, transfer or exchange of farm assets. That is what § 1222(a)(2)(A) provides and no more. It is beyond the province of this Court to provide "what we might think . . . is the preferred result." *Id.* at 542[, 124 S.Ct. 1023] (quoting *United States v. Granderson,* 511 U.S. 39, 68[, 114 S.Ct. 1259, 127 L.Ed.2d 611] (1994)).
>
> Because the taxes arising from the post-petition sale of the farm do not qualify as an administrative expense under § 503(b) and are not entitled to priority under § 507, they do not fall within the purview of § 1222(a)(2)(A)'s exception and may not "be treated as an unsecured claim that is not entitled to priority."

In re Hall, 376 B.R. at 747.

The government argued and the *Hall* Court agreed that the statute is not ambiguous and does not need clarification, and as such does not require

interpretation or review of legislative history. The *Hall* decision followed the *Brown* analysis:

> Instead, this Court agrees with the approach of the bankruptcy court in *In re Brown*, 2006 WL 3370867 (Bankr.D.Mass.Nov.20, 2006), which found that a Chapter 13 estate cannot be held liable for capital gains tax because it does not exist as a taxable entity . . . The Chapter 13 debtor argued that capital gains tax arising from the postpetition sale of his interest in rental property should be treated as an administrative claim for which the estate was liable. Since the debtor's interest in the property was property of the estate when it was sold, he contended the estate incurred the tax. *Id.* at *1. The debtor sought to have the taxes paid through the plan or have the Chapter 13 Trustee release funds to the debtor to pay the taxes. The Chapter 13 Trustee agreed that the taxes should be included in the plan. A creditor objected, arguing, *inter alia*, that § 1305 does not require a taxing authority to file a proof of claim; instead, a tax creditor may pursue its claim against the debtor after the case is closed.
>
> * * *
>
> This Court agrees with the *Brown* court that § 503(b)(1)(B)(i) must be read in conjunction with 26 U.S.C. §§ 398 [sic – 1398] and 1399 of the Internal Revenue Code. The starting point for interpreting a statutory provision is the language of the statute itself. *Lamie v. United States Trustee*, 540 U.S. 526, 534[, 124

S.Ct. 1023, 157 L.Ed.2d 1024] (2004). However, the statutory language must also be viewed in context: "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341[, 117 S.Ct. 843, 136 L.Ed.2d 808] (1997) (citations omitted). In this case, the context includes the interplay between the Bankruptcy Code, as amended by BAPCPA, and the Internal Revenue Code of 1986. The Internal Revenue Code treats a Chapter 12 estate (and Chapter 13 estate) differently from an estate arising under Chapter 7 or 11. There is no separate taxable entity created when an individual commences a case under Chapter 12 or 13. 26 U.S.C. §§ 1398, 1399. Consequently, the capital gains tax arising from the postpetition sale of the farm land cannot be a tax "incurred" by the Chapter 12 Estate under § 503(b)(1)(B)(i) because it does not exist as a separate taxable entity. 26 U.S.C. §§ 1398, 1399. In turn, because the postpetition capital gains tax is not entitled to priority under § 507, it does not fall within the exception carved out by § 1222(a)(2)(A).

This construction of § 1222(a)(2), as amended by BAPCPA, is reinforced by the familiar maxim that courts are to "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32[, 111 S.Ct. 317, 112 L.Ed.2d 275] (1990). When BAPCPA was enacted in 2005,

> this Court must assume that Congress was aware that a Chapter 12 estate is not a separate taxable entity.

In re Hall, 376 B.R. at 745-46.

The Courts in *In re Schilke*, *In re Dawes*, and *In re Knudsen* found in favor of the Debtor's position that the intent of the amendment to the Bankruptcy Act was to help family farmers through a Chapter 12 bankruptcy. The Debtor asks the Court to find (1) that taxes incurred from the post-petition sale of a debtor's real-property that is used in farming may be treated as a liability of the estate and discharged under 11 U.S.C. § 1222(a)(2)(A); and, (2) that the debtors in a Chapter 12 bankruptcy are not personally liable for taxes incurred from the post-petition sale of farming real-property. The Debtor argues that "Section 1222 provides that a government claim (such as a claim by the federal government for capital-gain taxes) is stripped of its priority status and treated as an unsecured claim if the claim arises from the sale or other disposition [of] a farm asset." (Opening Brief at 6.)

The Appellant/Debtor urges the Court to consider and apply the legislative history of 11 U.S.C. § 1222(a)(2)(A) to rule in their favor and overrule the Bankruptcy Court's decision. The government argues that the Court need not consider the legislative history because the language of the statute itself is not ambiguous on its face. Appellant urges that three cases that are contrary to the bankruptcy decision in

Hall, did consider and apply legislative history (*In re Dawes, In re Schilke, In re Knudsen*). "In light of the several courts' divergent conclusions, there must be some disconnect between a strict reading of the statute and its intended purpose. The governments' pleas to this Court to ignore the purpose of the law should not be heeded. This Court ignores the legislative history (and sound authority from several other jurisdictions) at the possible expense of denying the law its remedial purpose." (Debtor Reply at 8.)

This Court concurs with the application of *Knudsen* in *Dawes*:

> The IRS contends this Court should not follow *Knudsen* because it improperly relied upon [*In re L.J.O'Neill Shoe Co.*, 64 F.3d 1146 (8th Cir.1995)] It points out that in *O'Neill Shoe* administrative claim status of the capital gains from postpetition dispositions of assets was not in dispute, that amendment to § 507 by the BAPCPA abrogated the ruling of *O'Neill Shoe,* and that *O'Neill Shoe* was a Chapter 11 rather than a Chapter 12 case. None of these matters cause the Court to reject the holding of *Knudsen.* The fact that administrative claim status was not litigated supports this Court's view that the allowance of such claims as entitled to administrative priority is so well established, even for Chapter 11 corporate debtors, that it is seldom litigated. Further, as thoroughly examined above, this Court concludes that Chapter 12 postpetition capital gains taxes are administrative expenses

based upon Congressional intent without reliance on either *Knudsen* or *O'Neill Shoe*. Second, the amendment to § 507 after the *O'Neill Shoe* decision had to do with eighth priority claims, a matter not in issue in this case. Third, the fact that *O'Neill Shoe* is a Chapter 11 corporate debtor case means that in that case, as in this case, the filing of the petition did not create a separate taxable estate. This supports Debtors' argument that the fact that the filing of a Chapter 12 case does not create a new taxpayer does not defeat administrative claim status for the taxes in issue.

The Court respectfully declines to follow *Hall*, the § 1222(a)(2)(A) case which adopted the IRS' arguments. This Court questions the *Hall* court's reliance on the "maxim that the courts are to 'assume that Congress is aware of existing law when it passes legislation.'" Although IRC §§ 1398 and 1399 were in place at the time of BAPCPA, this Court has been unable to find any Chapter 12, or even any Chapter 7 or Chapter 11 case, where those IRC provisions were held to be relevant to the construction of the definition of administrative claim in § 503(b)(2)(B)(i). It is highly doubtful that Congress could have foreseen the impediment to the application of § 1222(a)(2)(A) relied upon by the IRS in this case.

In re Dawes, 382 B.R. at 516-17.

This Court also concurs with and adopts the analysis in *Schilke*:

> The *Knudsen* court acknowledged that the statute is ambiguous, but stated "I believe that Congress intended to help farmers reorganize and stay in business by lessening the burden of prepetition and postpetition taxes arising from the sale of assets used in the farmer's farming operation . . . " *In re Knudsen,* 356 B.R. at 491.
>
> The *Knudsen* court also relied on legislative history with respect to a bill that preceded the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") which contained a proposed amendment to § 1222(a)(2) identical to the change that was ultimately made in BAPCPA. Senator Grassley, who introduced that bill, made the following comments:
>
> "Safety 2000" [the predecessor bill] also helps farmers to reorganize by keeping the tax collectors at bay. Under current law, farmers often face a crushing tax liability if they need to sell livestock or land in order to reorganize their business affairs . . . Under the bankruptcy code, the I.R.S. must be paid in full for any tax liabilities generated during a bankruptcy reorganization. If the farmer can't pay the I.R.S. in full, then he can't keep his farm. That isn't sound policy. Why should the I.R.S. be allowed to veto a farmer's reorganization plan? "Safety 2000" takes this power away from the I.R.S. by reducing the

> priority of taxes during proceedings. This will free up capital for investment in the farm, and help farmers stay in the business of farming. 145 Cong. Rec. S750-02, 1999 WL 20426 (Jan. 20, 1999) (statement of Sen. Grassley on S.260).

In re Schilke, 379 B.R. at 902.

Finally, the United States District Court for the District of Iowa affirmed the bankruptcy court's decision in *Knudsen*, finding that "[t]he bankruptcy court's fundamental error, this court finds, was accepting the IRS's characterization of the pertinent provisions as federal income tax provisions found in the Bankruptcy Code, when they are properly understood as bankruptcy provisions to be construed in accordance with the Bankruptcy Code and bankruptcy policy to promote the effective reorganization of family farming operations." *In re Knudsen,*[1]

CONCLUSION

After a de novo review, this Court finds that it concurs with the results in *In re Knudsen, In re Dawes, and In re Schilke.* The legislative history relating to an earlier bill to amend § 1222(a)(2) in an identical manner clearly shows that the language used was intended to allow the debtor to use the amendments to § 1222(a)(2) for taxes generated

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[1] *See also Towers v. United States,* 64 F.3d 1292, 1298-1301 (9th Cir.1995) (Chapter 11 bankruptcy).

during the bankruptcy reorganization from the sale of assets used in a farming operation. The Court finds that the Halls, family farmers and Chapter 12 Debtors, may treat their postpetition capital gains taxes derived from their postpetition sale of real property as an administrative expense and the Halls' plan may treat the claim as an unsecured claim not entitled to priority.

Accordingly,

IT IS ORDERED that the decision of the Bankruptcy Court is REVERSED and the action is REMANDED with instructions to conform with this decision. The Clerk of the Court is directed to close this appeal and return the matter to the Bankruptcy Court.

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376 B.R. 741

United States Bankruptcy Court,
D. Arizona.
In re Lynwood D. **HALL** and Brenda Hall, Debtors.
No. 4-05-bk-04423-EWH.

Oct. 2, 2007.

Clifford B. Altfeld, Altfeld Battaile & Goldman, P.C., Tucson, AZ, for Debtors.

MEMORANDUM DECISION

EILEEN W. HOLLOWELL, Bankruptcy Judge.

I. *INTRODUCTION*

The Debtors, relying on a provision added to Chapter 12 by The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. 109-8, 119 Stat. 23, seek to have the capital gains tax generated by the postpetition sale of their farm treated as a liability of their Chapter 12 Estate ("Estate"). However, the new provision, 11 U.S.C. § 1222(a)(2)(a),[1] only applies to prepetition taxes that are entitled to priority status under § 507. Because the capital gains tax in question was generated by a postpetition sale, it may not be paid through the Chapter 12 plan or included in the Debtors' Chapter

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[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, as revised by BAPCPA.

12 discharge. The reasons for this conclusion are explained in the balance of this decision.

II. *FACTS AND PROCEDURAL HISTORY*

The facts are not in dispute. The Debtors filed for Chapter 12 relief on August 9, 2005.[2] The Court granted Debtors' motion to sell their 320-acre farm for the sum of $960,000 on September 22, 2005. The sale of the farm land generated a capital gains tax of about $29,000. The Internal Revenue Service ("IRS") filed Proofs of Claim for prepetition debt, but it did not file a Proof of Claim against the Estate for the postpetition capital gains tax. The Debtors' First Amended Plan, however, proposes to include that tax liability as an unsecured claim in Class 6,[3] which will be paid in full to the extent that funds are available, and otherwise will be paid pro rata with the other Class 6 claims and the balance discharged.

The IRS filed a timely objection. The IRS asserts that because the Estate is not a separate taxable entity in a Chapter 12 bankruptcy, the tax liability resulting from the postpetition sale was not incurred by the Estate, but is the responsibility of the Debtors. The

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[2] Unlike the general effective date of BAPCPA, the amendment to § 1222(a)(2) became effective on the date of enactment, April 20, 2005. Pub.L. 109-8, 119 Stat. 23 § 1003(c). Consequently, the newly added § 1222(a)(2)(A) applies to this case.

[3] Class 6 encompasses the priority claims of the IRS and Arizona Department of Revenue.

Debtors argue that postpetition taxes generated by the sale of farming assets are treated as unsecured debt of the Estate and dischargeable under 11 U.S.C. § 1222(a)(2), as amended by BAPCPA. In support, Debtors cite *In re Knudsen,* 356 B.R. 480 (Bankr.N.D.Iowa 2006), the only published opinion on the application of amended § 1222(a)(2) to postpetition taxes.

III. *ISSUE*

Is the capital gains tax arising from the postpetition sale of farm land a priority claim under § 507, which can be denied full payment in a Chapter 12 plan and treated as an unsecured claim not entitled to priority pursuant to § 1222(a)(2)(A)?

IV. *JURISDICTION*

Jurisdiction is proper under 28 U.S.C. § 1334 and § 157(a) and (b)(2)(B), (J) and (L).

V. *DISCUSSION*

A. *Statutory Framework*

Chapter 12 was created as a remedy for a "family farmer with regular annual income." *See* § 101(19). It is modeled after Chapter 13 and allows eligible farmer debtors to adjust their debts in a similar manner. 8 Collier on Bankruptcy ¶ 1200.01[2], p. 1200-4 (15th ed. rev.2006). The Chapter 12 debtor remains in possession and control of all the property and continues to operate the farm. § 1203. Upon confirmation

of the Chapter 12 debt adjustment plan, all property of the estate vests in the debtor unless the plan provides otherwise. § 1227(b). Section 1222(a) prescribes the mandatory contents of a Chapter 12 plan. Under § 1222(a)(2)(A) – the provision at issue – a Chapter 12 plan shall:

> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –
>
> > (A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; . . .

Under the plain language of § 1222(a)(2), in order to qualify for treatment as an unsecured claim, the claim must fall within one of the priority categories in § 507. Only claims entitled to priority under § 507 *and* falling within the terms of § 1222(a)(2)(A) may "be treated as an unsecured claim that is not entitled to priority under section 507." There are two potential categories under which taxes may fall within § 507: administrative expenses (§ 507(a)(2))[4] or allowed

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[4] This section was § 507(a)(1) before the general effective date of BAPCPA, when it was re-numbered to § 507(a)(2) and

(Continued on following page)

unsecured claims of governmental units (§ 507(a)(8)). Because § 507(a)(8) claims arise from taxes owed for prepetition years, 4 Collier on Bankruptcy ¶ 507.10[1], p. 507-61 (15th ed. rev.2006), the postpetition taxes in question here do not fall under that section. Consequently, the question is whether the taxes arising from the postpetition sale of the farm qualify as administrative expenses under § 507(a)(2).

The pertinent portion of § 507(a)(2) identifies as a priority "administrative expenses allowed under section 503(b)." In turn, § 503(b) provides, in relevant part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, . . . including –
>
> (1)(B) any tax –
>
> (i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; . . . .[5]

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administrative expenses were given second priority. Because the priority position of administrative expenses are not at issue, this section will be referred to as it was re-numbered under BAPCPA.

[5] The language quoted is the pre-BAPCPA version. Section 503(b)(1)(B)(i) was amended by BAPCPA to clarify that it applies to both secured and unsecured tax claims, *In re Brown & Cole Stores,* 375 B.R. 873, 877 (9th Cir. BAP 2007), and now reads: "incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title."

(Continued on following page)

In order for a tax to qualify as an administrative expense under § 503(b)(1)(B)(i), the tax must: (1) be "incurred by the estate"; and (2) not be specified in § 507(a)(8). *Towers v. United States* (*In re Pacific-Atlantic Trading Co.*), 64 F.3d 1292, 1298 (9th Cir.1995) (referring to § 507(a)(7)[6]); *Missouri Dept. of Revenue v. L.J. O'Neill Shoe Co.* (*In re O'Neill*), 64 F.3d 1146, 1149 (8th Cir.1995) (§ 507(a)(7), now § 507(a)(8)) (citations omitted). "If either of these two requirements is not satisfied, then the claim is not entitled to administrative expense treatment." *In re O'Neill*, 64 F.3d at 1149. As discussed above, the second prong is met because postpetition taxes do not fall within § 507(a)(8),[7] which applies to taxes owed for prepetition years.

This change was not effective until October 17, 2005, and the amendment does not apply to this case. In any event, the additional language would not affect the outcome here.

[6] The Bankruptcy Reform Act of 1994 re-numbered § 507(a)(7) to § 507(a)(8).

[7] At a status hearing in this case, the Trustee argued that the taxes arising from the sale of the farm are entitled to priority under § 507(a)(8)(C), as taxes "required to be collected or withheld and for which the debtor is liable in whatever capacity." Section 507(a)(8)(C) extends priority to so-called "trust fund" taxes, which "must be owed by a party other than the debtor and then collected or withheld by the debtor from the other party." 4 Collier on Bankruptcy ¶ 507.10[4], p. 507-73 (15th ed. rev.2006). Because the taxes at issue here are owed by the Debtors in the first instance, they do not fall within the scope of § 507(a)(8)(C). *Id.*

B. *Are Taxes Arising from the Postpetition Sale of Farm Assets Incurred by the Chapter 12 Estate?*

The question, then, is whether the capital gains tax arising from the postpetition sale of the farm land is a tax "incurred" by the Estate. The IRS argues that the taxes cannot be incurred by the Estate because – unlike cases filed under Chapter 7 or 11 – a Chapter 12 estate is not a separate taxable entity. The Internal Revenue Code creates a separate taxable entity upon the filing of petitions by individuals under Chapters 7 and 11, but does not create a separate taxable entity in cases filed by individuals under Chapters 12 and 13. 26 U.S.C. §§ 1398, 1399. Chapter 12 debtors must file their own tax returns and pay any postpetition taxes, which are incurred by the debtors themselves. Because a Chapter 12 estate does not constitute a separate taxable entity, it cannot incur a tax liability constituting an administrative expense.

The IRS also points out that there is no provision for filing a claim for postpetition taxes in Chapter 12. A Chapter 13 tax creditor may file a claim for postpetition taxes under § 1305,[8] but there is no corresponding provision in Chapter 12. The IRS argues that because it cannot file a claim for postpetition

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[8] Section 1305(a) provides that a creditor holding a claim "for taxes that become payable" while the case is pending may file a proof of claim. It should be noted that § 1305 speaks of "a claim against the debtor" – not the estate.

taxes against the Estate, the postpetition taxes cannot be claimed as an administrative expense of the Estate.

The Debtors counter that the court in *Knudsen* recognized that a Chapter 12 estate is not a separate taxable entity, but concluded that taxes incurred postpetition by the individual debtors can still be treated as administrative expenses under § 503(b)(1)(B) for purposes of payment under the plan. The *Knudsen* court specifically relied on *O'Neill,* 64 F.3d at 1152, in reaching this conclusion. 356 B.R. at 490.

However, the *Knudsen* court's reliance on *O'Neill,* a corporate Chapter 11 case, is misplaced. The primary issue before the Eighth Circuit in *O'Neill* was whether state taxes for prepetition corporate income qualified as administrative expenses. 64 F.3d at 1148. The Eighth Circuit did not decide whether the prepetition tax was "incurred by the estate" because the tax failed the second prong of the administrative expense test – it was "a tax of a kind specified in § 507(a)(7)" (now § 507(a)(8)). 64 F.3d at 1149. Further, there was no dispute that the taxes on postpetition corporate income were administrative expenses. 64 F.3d at 1148. The state's argument pertaining to postpetition taxes was that when income taxes straddle the petition date, the tax claim cannot be split into prepetition and postpetition portions because that splits the tax year between the prepetition corporation and the postpetition estate, but the estate is not a separate taxable entity under 26 U.S.C. § 1399. *Id.* at 1151-52. The Eighth Circuit

dismissed that argument, explaining that the corporate debtor was not being taxed as two separate entities. Rather, it was being taxed as one continuous corporate entity, but the payment of the tax was being divided into separate components under bankruptcy law to determine the priority of payment. *Id.* at 1152. Thus, *Knudsen* is not persuasive because of its reliance on a corporate Chapter 11 case, which is inapposite to answering the precise question at issue here – whether a Chapter 12 estate can incur a federal capital gains tax liability that arises postpetition.

Instead, this Court agrees with the approach of the bankruptcy court in *In re Brown,* 2006 WL 3370867 (Bankr.D.Mass. Nov.20, 2006), which found that a Chapter 13 estate cannot be held liable for capital gains tax because it does not exist as a taxable entity.[9] The Chapter 13 debtor argued that capital gains tax arising from the postpetition sale of his interest in rental property should be treated as an administrative claim for which the estate was liable. Since the debtor's interest in the property was property of the estate when it was sold, he contended the

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[9] Because Chapter 12 was modeled after Chapter 13 and many of the provisions are identical, it is appropriate for a court to look to Chapter 13 cases when ruling in a Chapter 12 case. 8 Collier on Bankruptcy ¶ 1200.01[5], p. 1200-12 (15th ed. rev.2006); *see also Cohen v. Lopez* (*In re Lopez*), 372 B.R. 40, 45 n. 13 (9th Cir. BAP 2007). Here, individuals filing under Chapter 12 and 13 are similarly situated in that the debtor's bankruptcy estate is not a separate taxable entity.

estate incurred the tax. *Id.* at *1. The debtor sought to have the taxes paid through the plan or have the Chapter 13 Trustee release funds to the debtor to pay the taxes. The Chapter 13 Trustee agreed that the taxes should be included in the plan. A creditor objected, arguing, *inter alia,* that § 1305 does not require a taxing authority to file a proof of claim; instead, a tax creditor may pursue its claim against the debtor after the case is closed.

In addressing whether the estate was liable for the tax, the *Brown* court first noted that § 503(b)(1)(B) "does not answer the question of what it means for a tax to be 'incurred by the estate.'" *Id.* at *2. The court opined, however, that § 1305 – not § 503(b) – controls postpetition tax claims in Chapter 13. *Id.* at *2. Section 1305 provides that a creditor may file a proof of claim. The choice to file a claim belongs to the creditor, and the debtor may not file one on its behalf. *Id.* The court then turned to the Internal Revenue Code, noting that it does not treat the Chapter 13 estate as a taxable entity. "It is the Debtor, not his estate, who is burdened by and benefits from gains and losses." *Id.* at *3 (citation omitted). The court concluded the Chapter 13 estate could not incur the capital gains tax when it did not exist as a taxable entity. *Id.*

This Court agrees with the *Brown* court that § 503(b)(1)(B)(i) must be read in conjunction with 26 U.S.C. §§ 1398 and 1399 of the Internal Revenue Code. The starting point for interpreting a statutory provision is the language of the statute itself. *Lamie*

v. United States Trustee, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). However, the statutory language must also be viewed in context: "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (citations omitted). In this case, the context includes the interplay between the Bankruptcy Code, as amended by BAPCPA, and the Internal Revenue Code of 1986. The Internal Revenue Code treats a Chapter 12 estate (and Chapter 13 estate) differently from an estate arising under Chapter 7 or 11. There is no separate taxable entity created when an individual commences a case under Chapter 12 or 13. 26 U.S.C. §§ 1398, 1399. Consequently, the capital gains tax arising from the postpetition sale of the farm land cannot be a tax "incurred" by the Chapter 12 Estate under § 503(b)(1)(B)(i) because it does not exist as a separate taxable entity. 26 U.S.C. §§ 1398, 1399. In turn, because the postpetition capital gains tax is not entitled to priority under § 507, it does not fall within the exception carved out by § 1222(a)(2)(A).

This construction of § 1222(a)(2), as amended by BAPCPA, is reinforced by the familiar maxim that courts are to "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). When BAPCPA was enacted in

2005, this Court must assume that Congress was aware that a Chapter 12 estate is not a separate taxable entity.

The *Knudsen* court relied, in part, on legislative history to conclude that Congress intended to provide tax relief for taxes generated postpetition. 356 B.R. at 492. The history cited in *Knudsen,* however, is not the legislative history of BAPCPA, but of legislation introduced in 1999. *Id.* As other bankruptcy courts have pointed out, the legislative history of BAPCPA is sparse and of little assistance in discerning legislative intent.[10]

Perhaps Congress meant to provide relief for postpetition taxes, but that is not what the statute provides. "It is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. United States Trustee,* 540 U.S. at 534, 124 S.Ct. 1023 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)) (other citations omitted). In this case, the disposition of the text is not absurd: as written, § 1222(a)(2)(A) creates an exception for

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[10] *See, e.g., In re Sorrell,* 359 B.R. 167, 176 (Bankr.S.D.Ohio 2007) ("To the extent legislative history of the 2005 Act can be used to resolve any arguable ambiguity in the statutory language, it is of dubious assistance."). *See also In re Kenney,* 2007 WL 1412921, at *7 (Bankr.E.D.Va. May 10, 2007); *In re Quevedo,* 345 B.R. 238, 246 (Bankr.S.D.Cal.2006).

priority claims arising from the *prepetition* sale, transfer or exchange of farm assets. That is what § 1222(a)(2)(A) provides and no more. It is beyond the province of this Court to provide "what we might think . . . is the preferred result." *Id.* at 542, 124 S.Ct. 1023 (quoting *United States v. Granderson,* 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611(1994)).

Because the taxes arising from the postpetition sale of the farm do not qualify as an administrative expense under § 503(b) and are not entitled to priority under § 507, they do not fall within the purview of § 1222(a)(2)(A)'s exception and may not "be treated as an unsecured claim that is not entitled to priority." Accordingly, the IRS's objection is sustained.

IV. *CONCLUSION*

The foregoing constitutes the Court's findings of fact and conclusions of law as required by Fed. R. Bankr.P. 7052. An order consistent with this Memorandum Decision will be entered this date.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. BRENDA HALL; LYNWOOD D. HALL, Appellees.	No. 08-17267 D.C. No. 4:07-cv-006790-DCB District of Arizona, Tucson **ORDER** (Filed Oct. 1, 2010)

Before: O'SCANNLAIN, TROTT* and PAEZ, Circuit Judges.

Judge O'Scannlain has voted to deny the petition for rehearing en banc, and Judge Trott has so recommended. Judge Paez has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

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* Senior Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. BRENDA HALL; LYNWOOD D. HALL, Appellees.	No. 08-17267 D.C. No. 4:07-cv-00679-DCB District of Arizona Tucson **ORDER**

Before: O'SCANNLAIN, Circuit Judge

Appellees' Application for Stay of Mandate, filed with this court on October 8, 2010, is GRANTED. Fed. R. App. P. 41(b).

It is ordered that the mandate is stayed for 90 days so that Appellees may file a petition for writ of certiorari in the Supreme Court. Fed. R. App. P. 41(d)(2). If such a petition is filed, the stay shall continue until final disposition by the Supreme Court.

U.S. Const. art. I, § 8, cl. 1.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States

. . . .

11 U.S.C. § 503. Allowance of administrative expenses

* * *

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

* * *

(1) . . .

* * *

(B) any tax –

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title . . . .

* * *

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11 U.S.C. § 507. Priorities

(a) The following expenses and claims have priority in the following order:

. . .

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and

charges assessed against the estate under chapter 123 of title 28.

. . .

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for –

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition –

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of –

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days.

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of

this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

* * *

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11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

. . .

(7) Any interest in property that the estate acquires after the commencement of the case.

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11 U.S.C. § 1207. Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title –

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first . . . .

* * *

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11 U.S.C. § 1222. Contents of the plan

(a) The plan shall –

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; or

(B) the holder of a particular claim agrees to a different treatment of that claim;

* * *

(c) Except as provided in subsections (b)(5) and (b)(9), the plan may not provide for payments over a period that is longer than three years unless the court for cause approves a longer period, but the court may not approve a period that is longer than five years.

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11 U.S.C. § 1305. Filing and allowance of post-petition claims

(a) A proof of claim may be filed by any entity that holds a claim against the debtor –

(1) for taxes that become payable to a governmental unit while the case is pending . . .

* * *

(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.

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26 U.S.C. § 1398. Rules relating to individuals' title 11 cases

(a) Cases to which section applies. – Except as provided in subsection (b), this section shall apply to any case under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of title 11 of the United States Code in which the debtor is an individual.

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26 U.S.C. § 1399. No separate taxable entities for partnerships, corporations, etc.

Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code.

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 20 2011
OFFICE OF THE CLERK

No. 10-875

In The
Supreme Court of the United States

LYNWOOD D. HALL and BRENDA A. HALL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In re Smith, ___ B.R. ___, 2011 WL 832110 (Bankr. W.D. Pa. Mar. 14, 2011) 2

REPLY BRIEF OF PETITIONERS

In its Brief, the United States unequivocally "agrees that this Court should grant review to resolve the conflict between the Eighth and Ninth Circuits regarding the proper treatment in Chapter 12 bankruptcy proceedings of post-petition tax liabilities resulting from the sale of farm assets." Brief for the United States ("Brief") at 14. The United States also agrees that the desirability of uniform administration of the Nation's tax and bankruptcy laws necessitates this Court's resolution of the split. *Id.*

The parties disagree, to some extent, about the reach of the Ninth Circuit's decision. The Solicitor General contends that corporate Chapter 11 cases are not implicated by the opinion below, asserting that such cases are governed by different statutes than those involved in this case. Brief at 11 n.6. Petitioners respectfully disagree. The Eighth Circuit specifically noted that IRC § 1399 applies to Chapter 11 corporate cases, and that bankruptcy estates in those cases are not "taxable entities." *See Knudsen v. IRS (In re Knudsen)*, 581 F.3d 696, 708 n.2 (8th Cir. 2009); *see also In re Dawes*, 382 B.R. 509, 518 (Bankr. D. Kan. 2008) ("If this Court were to adopt the rationale urged by the IRS, the holding would impact not only Chapter 12 cases, but also corporate Chapter 7 and 11 cases, and perhaps even tax claims of local and state authorities."). The root of the Government's arguments is IRC § 1399, which applies to all debtors except individuals that file petitions under Chapter 7 or Chapter 11 of the Bankruptcy Code. The opinion

below, if left standing, has the potential to throw all business bankruptcy cases into disarray. But whether the scope of the Ninth Circuit's decision is expansive, as Petitioners assert, or more narrow, as the Government contends, the desirability of this Court's intervention is manifest.

In the short period of time since the Petition filing, confusion in Chapter 12 cases has been illustrated by yet another published opinion, *In re Smith*, ___ B.R. ___, ___, 2011 WL 832110, at *9-*10 (Bankr. W.D. Pa. Mar. 14, 2011). The court in *Smith* attempted to decide whether it should follow the Eighth Circuit or the Ninth Circuit. Ultimately, the court concluded that it could not determine which case was correct, and instead decided the matter on other grounds. *See id.* The *Smith* case is further evidence that bankruptcy judges in the Third Circuit, as elsewhere, are troubled by the current state of uncertainty, and that practitioners do not know how to advise their clients. As the United States also notes in its brief, there are several cases like *Smith* pending before various courts around the country. Brief at 13.

Much of the Government's Brief concerns the merits. To be sure, Petitioners and the Solicitor General, like the Eighth and Ninth Circuits, disagree about the meaning of the statutory scheme. Both sides agree, however, that the Court should grant certiorari precisely to address that dispute.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

RECORD AND BRIEFS

No. 10-875

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In The Supreme Court of the United States

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JOINT APPENDIX

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Counsel for Respondent

Petition For Certiorari Filed December 30, 2010
Certiorari Granted June 13, 2011

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The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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RELEVANT DOCKET ENTRIES FOR THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA, ADMINISTRATIVE CASE, NO. 4:05-bk-04423-TUC-EWH

Date Filed	No.	Docket Text
8/9/2005	1	Chapter 12 Voluntary Petition, Mailing List, Schedules and Statements (except for those listed below). Electronic Filing Declaration due 8/29/2005, Schedules and Statement of Financial Affairs due 8/24/2005, Attorney Disclosure Statement due 8/24/2005, filed by CLIFFORD B ALTFELD of LEONARD FELKER ALTFELD ET AL. on behalf of LYNWOOD D HALL, Brenda Hall (ALTFELD, CLIFFORD) Modified on 8/11/2005 (Dooley, Eileen). (Entered: 08/09/2005)
8/31/2005	9	Motion to Approve Sale Debtors' Motion to Sell Property filed by CLIFFORD B ALTFELD of LEONARD FELKER ALTFELD ET AL. on behalf of BRENDA HALL, LYNWOOD D. HALL. (ALTFELD, CLIFFORD) (Entered: 08/31/2005)
9/2/2005	14	Motion to Dismiss Case "Motion to Dismiss and Opposition to Debtors' Motion to Sell Property Free and Clear of Liens" filed by

		JONATHAN M. SAFFER of SNELL & WILMER, LLP on behalf of O. Ray Osborn, CAROLYN OSBORN. (SAFFER, JONATHAN) (Entered: 09/02/2005)
9/12/2005	22	Response to Motion/Application to Dismiss and Opposition to Debtors' Motion to Sell Property Free and Clear of Liens (related to motions(s)14) filed by ALAN R. COSTELLO of COSTELLO LAW FIRM on behalf of DAVID M. REAVES. (COSTELLO, ALAN) (Entered: 09/12/2005)
9/19/2005	30	Minute Entry EVIDENTIARY HEARING ON DEBTOR'S MOTION TO SELL REAL PROPERTY FREE AND CLEAR OF LIENS AND OSBORNS' OBJECTION THERETO. {1096755}. (related document(s)9) (Mattingly, Teresa) (Entered: 09/28/2005)
1/17/2006	65	Motion to Convert Case to Chapter 7 (15.00 fee) filed by JONATHAN M. SAFFER of SNELL & WILMER, LLP on behalf of CAROLYN OSBORN, O. Ray Osborn. (SAFFER, JONATHAN) (Entered: 01/17/2006)
2/2/2006	70	Memorandum Decision (also docketed in A05-195) signed on 2/2/2006. (Richard, Trudy) (Entered: 02/02/2006)

3/15/2006	76	Notice of Entry of Copy of Amended Order Approving Settlement Adv 05-195(related document(s)64, 65) (Granillo, Bev) Modified on 3/16/2006 (Granillo, Bev). (Entered: 03/16/2006)
12/22/2006	95	Chapter 12 Plan of Reorganization and Consolidated Disclosure Statement filed by CLIFFORD B ALTFELD of LEONARD FELKER ALTFELD ET AL. on behalf of BRENDA HALL, LYNWOOD D. HALL.(ALTFELD, CLIFFORD) (Entered: 12/22/2006)
3/2/2007	123	Supplemental Chapter 12 Plan Debtors' Supplement to Proposed Plan of Reorganization filed by CLIFFORD B ALTFELD of ALTFELD BATTAILE & GOLDMAN, P.C. on behalf of BRENDA HALL, LYNWOOD D. HALL.(ALTFELD, CLIFFORD) (Entered: 03/02/2007)
5/22/2007	130	Minutes of Hearing held on: 05/22/2007 Subject: CONTINUED HEARING ON APPROVAL OF DEBTOR'S CHAPTER 12 PLAN OF REORGANIZATION AND CONSOLIDATED DISCLOSURE STATEMENT (reset from 2/1/07)

		(reset from 2/20/07) (cont from 3/6/07) (Cont. from 4/24/07-tlm). (vCal Hearing ID (1102886)). (related document(s)95) (Turnbull, Cindy) (Entered: 05/22/2007)
6/22/2007	142	First Amended Disclosure Statement Consolidated Disclosure Statement and Plan of Reorganization Dated June 8, 2007 filed by CLIFFORD B ALTFELD of ALTFELD BATTAILE & GOLDMAN, P.C. on behalf of BRENDA HALL, LYNWOOD D. HALL.(ALTFELD, CLIFFORD) (Entered: 06/22/2007)
7/18/2007	148	Objection to Debtor's First Amended Plan of Reorganization dated June 8, 2007 filed by ELIZABETH A. WILSON of U.S. ATTORNEY'S OFFICE on behalf of INTERNAL REVENUE SERVICE (related document(s) 142). (WILSON, ELIZABETH) (Entered: 07/18/2007)
7/23/2007	152	Trustee Objection /Trustee's Objection to Chapter 12 Plan filed by ALAN R. COSTELLO of COSTELLO LAW FIRM on behalf of DAVID M. REAVES (related document(s)142). (COSTELLO, ALAN) (Entered: 07/23/2007)
7/25/2007	156	Memorandum of Law (11 U.S.C. 1222) filed by CLIFFORD B

		ALTFELD of ALTFELD BATTAILE & GOLDMAN, P.C. on behalf of BRENDA HALL, LYNWOOD D. HALL. (ALTFELD, CLIFFORD) (Entered: 07/25/2007)
7/25/2007	159	Minutes of Hearing held on: 07/25/2007 Subject: ***VIDEO CONFERENCE*** HEARING; FIRST AMENDED CONSOLIDATED DISCLOSURE STATEMENT AND PLAN OF REORGANIZATION DATED JUNE 8, 2007 and ***VIDEO CONFERENCE*** CONTINUED HEARING ON CONFIRMATION OF DEBTOR'S CHAPTER 12 PLAN OF REORGANIZATION AND CONSOLIDATED DISCLOSURE STATEMENT (reset from 2/1/07) (reset from 2/20/07) (cont from 3/6/07) (Cont. from 4/24/07-tlm) (CONT. FROM 5/22/07). (vCal Hearing ID (1103244)). (related document(s)95, 142) (Mattingly, Teresa) (Entered: 08/02/2007)
7/27/2007	158	Order Granting and Directing Chapter 12 Trustee to Pay Secured Claims of The Internal Revenue Service and Cochise County signed on 7/27/2007 .

		(Granillo, Bev) (Entered: 07/30/2007)
8/14/2007	160	Memorandum of Law in Support of Its Objection to Debtor's First Amended Plan of Reorganization dated June 8, 2007 filed by ELIZABETH A. WILSON of U.S. ATTORNEY'S OFFICE on behalf of INTERNAL REVENUE SERVICE. (WILSON, ELIZABETH) (Entered: 08/14/2007)
8/20/2007	163	Memorandum of Law SUPPLEMENTAL MEMORANDUM OF LAW AND RESPONSE TO GOVERNMENTS' OBJECTIONS TO PLAN filed by CLIFFORD B ALTFELD of ALTFELD BATTAILE & GOLDMAN, P.C. on behalf of BRENDA HALL, LYNWOOD D. HALL (Attachments: 1 Exhibit 12 Exhibit 2). (ALTFELD, CLIFFORD) (Entered: 08/20/2007)
9/27/2007	170	Minutes of Hearing held on: 09/27/2007 Subject: ***TELEPHONIC*** STATUS HEARING REGARDING FIRST AMENDED CONSOLIDATED DISCLOSURE STATEMENT AND PLAN OF REORGANIZATION DATED JUNE 8, 2007 (cont. from 7/25/07).

		(vCal Hearing ID (1104037)). (related document(s)142) (Mattingly, Teresa) (Entered: 10/02/2007)
10/2/2007	171	Memorandum Decision signed on 10/2/2007 (related document(s) 148) . (Granillo, Bev) (Entered: 10/03/2007)
10/2/2007	172	ORDER signed on 10/2/2007 (related document(s)148) . (Granillo, Bev) (Entered: 10/03/2007)
10/15/2007	175	Motion for Reconsideration and Motion for New Trial filed by CLIFFORD B ALTFELD of ALTFELD BATTAILE & GOLDMAN, P.C. on behalf of BRENDA HALL, LYNWOOD D. HALL (Attachments: 1 Exhibit A2 Exhibit B). (ALTFELD, CLIFFORD) (Entered: 10/15/2007)
11/5/2007	180	Objection to Motion/Application : United States of America's Opposition to Debtors' Motion for New Trial and Motion for Reconsideration (related to motions(s) 175) filed by ELIZABETH A. WILSON of U.S. ATTORNEY'S OFFICE on behalf of INTERNAL REVENUE SERVICE. (WILSON, ELIZABETH) (Entered: 11/05/2007)
11/13/2007	183	Minutes of Hearing held on: 11/13/2007

		Subject: HEARING ON DEBTOR'S MOTION FOR RECONSIDERATION AND MOTION FOR NEW TRIAL FILED ON BEHALF OF BRENDA HALL AND LYNWOOD D. HALL .. (vCal Hearing ID (1105141)). (related document(s)175) (Mattingly, Teresa) (Entered: 11/16/2007)
11/19/2007	184	ORDER Denying Motion for Reconsideration (Related Doc # 175) signed on 11/19/2007 . (Granillo, Bev) (Entered: 11/20/2007)
11/28/2007	185	Notice of Appeal (255.00 fee) filed by CLIFFORD B ALTFELD of ALTFELD BATTAILE & GOLDMAN, P.C. on behalf of BRENDA HALL, LYNWOOD D. HALL (Attachments: 1 Exhibit A2 Exhibit B3 Exhibit C4 Exhibit D5 Exhibit E). (ALTFELD, CLIFFORD) (Entered: 11/28/2007)
12/10/2007	192	Designation of Items to be Included in the Record on Appeal. and Statement of Issues filed by CLIFFORD B ALTFELD of ALTFELD BATTAILE & GOLDMAN, P.C. on behalf of BRENDA HALL, LYNWOOD D.

		HALL.(ALTFELD, CLIFFORD) (Entered: 12/10/2007)
12/21/2007	195	Acknowledgment of Appeal by BAP assigned no.: AZ-07-1441. (related document(s)185) (Jackson-Walker, Vicky) (Entered: 12/21/2007)
1/10/2008	196	Notice of Receipt of Appeal/ Bankruptcy Matter in District Court (related document(s) 185) (Granillo, Bev) (Entered: 01/10/2008)
1/10/2008	197	Certificate That Record on Appeal is Complete to the US District Court (related document(s) 185) (Granillo, Bev) (Entered: 01/10/2008)
1/18/2008	198	Notice of Entry of Copy of Appellee USA Statement of Election to Tranfer Appeal to the District Court (originally filed on 12.12.07 in Distritct [sic] Court) (related document(s)185) (Granillo, Bev) (Entered: 01/18/2008)
7/1/2011	251	Trustee Interim Report MAY 2011 filed by DAVID M. REAVES on behalf of DAVID M. REAVES.(REAVES, DAVID) (Entered: 07/01/2011)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA, ADVERSARY PROCEEDING NO. 05-ap-00195-EWH

Date Filed	No.	Docket Text
8/29/2005	1	Notice of Removal (Fee Due) filed by JONATHAN M. SAFFER of SNELL & WILMER, LLP on behalf of Carolyn Osborn, O. Ray Osborn (Attachments: 1 Volume(s) One of attachments2 Volume(s) Two of attachments). (SAFFER, JONATHAN) (Entered: 08/29/2005)
9/22/2005	6	Stipulation Stipulated Motion Allowing Sale of Property Free and Clear of All LIens and for Partial Disbursement of Proceeds filed by CLIFFORD B ALTFELD of LEONARD FELKER ALTFELD ET AL. on behalf of BRENDA HALL, LYNWOOD D. HALL. (ALTFELD, CLIFFORD) (Entered: 09/22/2005)
9/22/2005	8	Stipulated Order signed on 9/22/2005 (related document(s)6, 7) . (Dooley, Eileen) (Entered: 09/23/2005)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NO. CV-07-679-TUC-DCB

Date Filed	No.	Docket Text
12/21/2007	1	COMPLAINT., filed by USA. (GPA,) (Entered: 12/21/2007)
1/30/2008	8	Appellant's BRIEF by Lynwood D. Hall, Brenda Hall. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Barrett, John) (Entered: 01/30/2008)
2/21/2008	10	Appellee's BRIEF by USA. (Johnson, Steven) (Entered: 02/21/2008)
3/5/2008	15	Appellee's BRIEF by State of Arizona ex rel Arizona Department of Revenue. (Faulk, Denise) (Entered: 03/05/2008)
3/7/2008	17	Appellant's REPLY BRIEF by Lynwood D. Hall, Brenda Hall. (Barrett, John) (Entered: 03/07/2008)
5/12/2008	19	Minute Entry for hearing on oral argument re: bankruptcy appeal held on 5/12/2008 before Judge David C. Bury. (Court Reporter Chris Wallace.)(CJS) (Entered: 05/12/2008)
6/18/2008	20	Appeal Document by Lynwood D. Hall, Brenda Hall Letter to Clerk

		of Court Providing Supplemental Authority (Altfeld, Clifford) (Entered: 06/18/2008)
8/7/2008	21	ORDER decision of Bankruptcy Court is reversed & action remanded w/ instructions to conform w/ this decision. Clk Crt to close appeal & return matter to Bankruptcy Court. Signed by Judge David C Bury on 8/6/08. See attached pdf for complete information. (KMF,) (Entered: 08/07/2008)
9/30/2008	22	NOTICE OF APPEAL to 9th Circuit, by USA. (Attachments: # 1 Exhibit Docketing Statement, # 2 Exhibit Order from which the United States Appeals)(Johnson, Steven) (Entered: 09/30/2008)
12/3/2008	27	TRANSCRIPT filed for hearing on ORAL ARGUMENT for dates of May 12, 2008 before Judge David C. Bury. Court Reporter: Chris Wallace. Re 22 Notice of Appeal. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 12/24/2008. Redacted Transcript Deadline set for 1/5/2009. Release

		of Transcript Restriction set for 3/3/2009. (SFuller) (Entered: 12/31/2008)
1/28/2009	29	CERTIFICATE OF RECORD TRANSMITTED TO 9TH CIRCUIT COURT OF APPEALS re 22 Notice of Appeal (CLJ,) (Entered: 01/28/2009)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, NO. 08-17267

Date Filed	No.	Docket Text
10/17/2008	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND CADS: No. The schedule is set as follows: Designation of RT for Appellant United States of America due 08/18/2008. Designation of RT for Appellee Brenda Hall and Lynwood D. Hall due 08/27/2008. Transcript order for Appellant United States of America due 09/08/2008. Transcript due for Court Reporter Chris Wallace, Court Reporter on 10/06/2008. Certificate of record due 09/15/2008. Appellant United States of America opening brief due 11/24/2008. Appellee Brenda Hall and Appellee Lynwood D. Hall answering brief due 12/22/2008. Appellant's optional reply brief is due 14 days after service of the answering brief. (RT)
03/11/2009	18	Submitted (ECF) Opening brief for review. Submitted by Appellant USA. Date of service: 03/11/2009. [6841238] (PJU)

03/11/2009	19	Filed Appellant USA excerpts of record in 1 volume. Served on 03/09/2009 (LA)
03/12/2009	(no docket #)	Filed clerk order: Opening Brief [18] filed by USA in 08-17267. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Blue cover, accompanied by certification that the brief is identical to the version submitted electronically. (LA)
05/26/2009	25	Submitted (ECF) Answering brief for review. Submitted by Appellees Brenda Hall and Lynwood D. Hall. Date of service: 05/26/2009. [6932796] (CBA)
05/27/2009	(no docket #)	Filed clerk order: Answering Brief [25] filed by Brenda Hall and Lynwood D. Hall. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. (LA)

5/27/2009	27	Filed Appellees' supplemental excerpts of record on appeal in 1 volume. (LA)
7/08/2009	30	Submitted (ECF) Reply brief for review. Submitted by Appellant USA. Date of service: 07/08/2009. [6985100] (PJU)
7/08/2009	31	Filed clerk order: Reply Brief [30] filed by USA. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Grey cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [6985395] (LA)
9/23/2009	37	Filed (ECF) Appellees Brenda Hall and Lynwood D. Hall citation of supplemental authorities. Date of service: 09/23/2009. [7072659] (CBA)
1/26/2010	42	Filed (ECF) Appellant USA citation of supplemental authorities. Date of service: 01/26/2010. [7208510] (PJU)
2/10/2010	43	ARGUED AND SUBMITTED TO DIARMUID F. O'SCANNLAIN, STEPHEN S.

		TROTT and RICHARD A. PAEZ. [7227542] (AN)
6/22/2010	44	Filed (ECF) Appellees Brenda Hall and Lynwood D. Hall citation of supplemental authorities. Date of service: 06/22/2010. [7380425] (CBA)
8/16/2010	45	FILED OPINION (DIARMUID F. O'SCANNLAIN, STEPHEN S. TROTT and RICHARD A. PAEZ) REVERSED. Judge: DFO Authoring, Judge: RAP Dissenting. FILED AND ENTERED JUDGMENT. [7440293] (RP)
8/27/2010	49	Filed (ECF) Appellees Brenda Hall and Lynwood D. Hall petition for rehearing en banc (from 08/16/2010 opinion). Date of service: 08/27/2010. [7455842] (CBA)
10/1/2010	50	Filed order (DIARMUID F. O'SCANNLAIN, STEPHEN S. TROTT and RICHARD A. PAEZ) The petition for rehearing en banc is DENIED. [7493993] (BJB)
10/8/2010	51	Filed (ECF) Appellees Brenda Hall and Lynwood D. Hall Motion to stay the mandate. Date of service: 10/08/2010. [7503259] (CBA)

10/15/2010	52	**Filed order (DIARMUID F. O'SCANNLAIN) Appellees' Application for Stay of Mandate, filed with this court on October 8, 2010, is GRANTED. Fed. R. App. P. 41(b). It is ordered that the mandate is stayed for 90 days so that Appellees may file a petition for writ of certiorari in the Supreme Court. Fed. R. App. P. 41(d)(2). If such a petition is filed, the stay shall continue until final disposition by the Supreme Court. [7511063] (BJB)**
1/6/2011	53	**Received notice from the Supreme Court: petition for certiorari filed on 12/30/2010. Supreme Court Number 10-875. [7602653] (GV)**
6/13/2011	55	**Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/13/2011. Supreme Court Number 10-875. [7783523] (GV)**

ORDERED.

[SEAL]

Dated: September 22, 2005

/s/ Eileen W. Hollowell
EILEEN W. HOLLOWELL
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re: Lynwood D. Hall and Brenda A. Hall, husband and wife, Debtors,	Case No. 05-04423-TUC-EWH [Chapter 12 Proceedings] Adv. No. 05-ap-00195-EWH
O. RAY OSBORN and CAROLYN OSBORN, husband and wife, both in their individual capacity and as Trustees of the Osborn Family Trust, Plaintiffs, v. LYNWOOD D. HALL and BRENDA A. HALL, husband and wife; THE PICNIC BARREL LIQUOR MART, INC., an Arizona corporation; D. JOE BARNES, and PATRICIA G. BARNES, husband and	ORDER

wife; and FIRST AMERICAN TITLE INSURANCE AGENCY OF PINAL COUNTY, an Arizona corporation, a/k/a First American Title Insurance Company, a/k/a First American Title and Trust,

Defendants.

Debtors Lynwood D. Hall and Brenda A. Hall ("Debtors"), Secured Creditor O. Ray Osborn and Carolyn Osborn, husband and wife, both in their individual capacity and as Trustees of the Osborn Family Trust ("the Osborns") and David Reaves, Chapter 12 Trustee ("Trustee") having stipulated to the relief contained herein, the Court having heard arguments of counsel, and good cause appearing therefore, IT IS HEREBY ORDERED:

1. Debtors filed a Motion to Sell Property Free and Clear of All Liens on August 31, 2005, seeking approval under 11 U.S.C. § 363 to sell their 320 acre farm in Wilcox, Arizona to D. Joe Barnes and Patricia Barnes and The Picnic Barrel for the sum of $3,000 per acre, $960,000.

2. On September 2, 2005, the Osborns filed a Motion to Dismiss and Opposition to Debtors' Motion to Sell Property Free and Clear of Liens.

3. On September 13, 2005, the parties stipulated to a continuance of the hearing on the motions to

September 19, 2005 at 1:30 p.m. Thereafter, the parties entered into settlement negotiations resulting in an agreed motion for entry of this Order.

4. Upon approval of this Order, the Osborns withdraw their Motion to Dismiss and Opposition to Debtors' Motion to Sell Property Free and Clear of Liens.

5. Debtors' motion to sell their 320 acre farm to D. Joe Barnes, Patricia Barnes and The Picnic Barrel is hereby granted as modified herein. Debtors may execute all necessary documents to consummate the sale including deeds and necessary escrow documents. The escrow officer is authorized to close the escrow and convey title free and clear of all liens. Any and all liens shall attach to the sale proceeds.

6. The escrow officer shall pay the sum of $400,000 at closing to O. Ray Osborn and Carolyn Osborn, or their designee. This sum shall be credited to the debt the Debtors owe the Osborns and/or the Trust. The parties preserve all rights to argue that the amount owed by the Debtors to the Osborns and the Trust is less than, or greater than, $400,000. The $400,000 payment shall be a credit against the indebtedness owed but shall not constitute a satisfaction of any obligations nor shall it constitute an admission by the Debtors that the Osborns are owed $400,000. The amount of the Debtors' obligations to the Osborns and the Trust and the Osborns and the Trusts' obligations to the Debtors shall be resolved in continued proceedings as directed by the Court in

adversary proceeding Adv. No. 05-1p-00195-EWH. The claims of the Osborns and the Trust, whether secured or unsecured, are preserved and shall be litigated in Adv. No. 05-ap-00195-EWH. Any and all liens for such claims attach to the proceeds of the sale of the farm by Debtors to D. Joe Barnes, Patricia Barnes and The Picnic Barrel.

7. The escrow officer shall pay Sunstate Bank the full amount of principal, interest, and other charges, if any, on the line of credit secured by the farm, its crop, and other assets. Sunstate Bank shall release all liens and encumbrances for the line of credit as a condition of receiving payment.

8. The Debtors and the Osborns and the Trust dispute the ownership of two irrigation system pivots, which are the subject of the secured indebtedness to Sunstate Bank and IEDA, and which shall be conveyed at closing to D. Joe Barnes, Patricia Barnes and The Picnic Barrel. The escrow officer shall pay to Sunstate Bank and IEDA the secured pivot obligations in full at closing. The claims of ownership of the irrigation system pivots shall be litigated by Debtors, the Osborns, and the Trust in Adv. No. 05-ap-00195-EWH.

9. With regard to personal property and equipment at the Debtors' farm, or in Debtors' possession or control, other than the pivots and related equipment, all parties reserve the right to pursue their claims to title. Unless otherwise directed by the Court, the Debtors shall maintain and preserve all

personal property and equipment whose ownership is disputed by the parties.

10. The balance of the sales proceeds shall be paid to David Reaves, Chapter 12 Trustee, who shall hold such funds pending the Bankruptcy Court's rulings on the disposition of the funds and on the claims of ownership and entitlement as litigated in Adv. No. 05-ap-00195-EWH. The real estate commission shall not be paid from escrow and shall only be paid in accordance with further order of this Court.

11. The Debtors shall not dismiss, or seek the dismissal of the Chapter 12 proceeding without seeking the consent of the Trustee and the Osborns obtaining Court authorization. In the event that the Chapter 12 bankruptcy is dismissed for any reason, the parties agree that the balance of the sales proceeds, minus such amount sufficient to pay Chapter 12 administrative claims in full, will be held in escrow or interpled with the Clerk of the Cochise County Superior Court pending an Order of the Cochise County Superior Court addressing the final disposition of the funds.

12. Of the sale proceeds paid to and held by David Reaves, Chapter 12 Trustee, the sum of $30,000 shall be reserved for payment to unsecured creditors, for Chapter 12 Trustee fees, and Chapter 12 Trustee's attorneys' fees and expenses.

13. The Debtors' homestead claim does not apply to the sale property or the sale proceeds generated therefrom.

DONE IN OPEN COURT this ____ day of _____, 2005.

_____

HON. EILEEN W. HOLLOWELL
UNITED STATES BANKRUPTCY
JUDGE

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THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re: Lynwood D. Hall and Brenda A. Hall, husband and wife, Debtors.	Case No. 05-04423-TUC-EWH **DEBTORS' FIRST AMENDED CONSOLIDATED DISCLOSURE STATEMENT AND PLAN OF REORGANIZATION DATED JUNE 8, 2007** Chapter 12

THE DEBTORS' FIRST AMENDED CONSOLIDATED DISCLOSURE STATEMENT AND PLAN OF REORGANIZATION DATED JUNE 8, 2007

The Debtors, Lynwood D. Hall and Brenda A. Hall, husband and wife, hereby submit this Consolidated Disclosure Statement and Plan of Reorganization (the "Plan") dated June 8, 2007 (the "Plan").

History and Organization of the Debtors

The Debtors provide the following relevant history prior to their filing Chapter 12 bankruptcy on August 9, 2005. Debtors owned and operated agricultural property in Willcox, Arizona, specifically a 320-acre farm located at Kansas Settlement Road, Willcox, Arizona ("Hall Farms"), with an approximate value of $960,000. Hall Farms was subject to a claim by O. Ray Osborn and Carolyn Osborn, as described below, and was also the subject of a contract to sell to Donnie Joe and Patricia Barnes and The Picnic Barrel, for the amount of $960,000.

The Debtors attempted for ten years to resolve substantial disputed claims with the Internal Revenue Service, arising out of alleged failure to make employee trust fund payments (943 payments). Debtors engaged in the Offer in Compromise process and litigated their tax liability with the IRS.

The Debtors also disputed the claims of Mr. Osborn. Mr. Osborn is the father of Debtor Brenda Hall. Mr. Osborn was a substantial shareholder in Central Machinery Co., which also sold certain machinery to the Debtors. Brenda Hall, at one time, owned stock in Central Machinery. As a result, the claims of the Osborns, the Debtors and Central Machinery were intermingled and the accounting was subject to substantial dispute. Mr. Osborn attempted to foreclose on deeds of trust he held on Hall Farms. He filed a foreclosure action as Cochise County Civil

Action No. CV2005-00296. The Halls then filed counterclaims against the Osborns. Following the bankruptcy, this litigation was removed to the bankruptcy court. Following substantial litigation and mediation negotiated by a bankruptcy mediator, attorney Lowell Rothschild, the Debtors and the Osborns settled their claims, the sale of the Hall Farms was concluded and the Osborns were paid $215,000 from the sale of Hall Farms. Debtors and O. Ray Osborn and Carolyn Osborn, as well as David Salyers and Central Machinery, all executed mutual releases pursuant to an approved settlement agreement approved by this court on March 15, 2006. The adversary proceeding was thereafter dismissed with prejudice.

The sale of Hall Farms to the Osborns and The Picnic Barrel closed, and the Trustee, David Reaves, disbursed $215,000 to the Osborns. The Trustee is currently holding approximately $118,000.

The Debtors sought administrative treatment for the real estate agent involved in the sale of the property, Palo Verde Land and Investment. However, pursuant to court order, that claim was denied administrative treatment and, accordingly, will be treated as an unsecured claim.

Section One
Defined Terms

1.1 Administrative claim: An "administrative claim" means a claim entitled to priority pursuant to §507(a)(1) of the Bankruptcy Code. Such claims are

those for administrative expenses of the kind specified in §503(b) of the Bankruptcy Code, including, without limitation, the actual and necessary costs and expenses of preserving and operating the estate and compensation and reimbursement of expenses for legal and other services awarded under §§ 328, 330(a) and/or 331 of the Bankruptcy Code, as well as all fees and charges assessed against the estate pursuant to Chapter 123 of Title 28, *United States Code.*

1.2 Allowed Claim: An "allowed claim" is every claim:

(1) As to which a proof of such claim has been filed with the Court within the time fixed by the Court or, if such claim arises for the rejection of an executory contract, within thirty (30) days after the date of rejection; or

(2) Which the Debtor has listed, as of the Effective Date of the Plan, as undisputed except that the listing of undisputed executory contract rejection claims, if applicable, will be due on the first business day occurring at least seven (7) days after the filing deadline for such claims; and

(3)(i) As to which no objection to the allowance of such claim, or request for marshaling or subordination with respect to such claim, has been filed within any applicable time period fixed by the Court, or (ii) as to which the order allowing such claim and establishing (if applicable) the terms and priority of its distribution has become final and non-appealable.

1.3 Assumed executory contracts: "Assumed executory contracts" are those executory contracts or unexpired leases which, pursuant to Code §365, the Debtor assumes on the Effective Date of the Plan.

1.4 Case: "Case" shall mean the Chapter 11 case commenced by the filing with this Court on August 2, 2006 of the Voluntary Petition for Relief under Chapter 11 of the Code by the Debtor, which Petition was assigned Case No. 4-06-00899-TUC-EWH.

1.5 Chapter 12: This term will refer to Chapter 12 of the Code, 11 U.S.C. §1201, *et seq.*, as amended.

1.6 Claim: This term will refer to and mean every right and remedy encompassed within the statutory definition and set forth in § 101(5) of the Code, 11 U.S.C. § 101(5), regardless of whether such claim is an allowed claim.

1.7 Claims resolution process: The claims resolution process means the entire process whereby (i) claims of creditors which are eligible for distributions pursuant to the Plan are allowed in accordance with Code §502, whether by adjudication and order(s) of the Court or otherwise, and (ii) the Court's order(s) with respect to allowance of any such claim(s) establishing (if applicable) the terms and priority of distribution of such claim(s), including, but not limited to, adjudication of any marshaling or subordination contentions.

1.8 Code: The "Code" is Title 11 of the United States Code, 11 U.S.C. § 101, *et seq.*, as amended,

commonly referred to as the United States Bankruptcy Code.

1.9 Confirmation date: The "confirmation date" is the date on which the Court enters its Confirmation Order in accordance with Rules 5003 and 9021 of the *Rules of Bankruptcy Procedure*.

1.10 Confirmation Order: The "Confirmation Order" is the Court's written judgment and order which confirms the Plan.

1.11 Court: The "Court" is the United States Bankruptcy Court for the District of Arizona, except insofar as it is necessary for jurisdiction to be exercised by the United States District Court for the District of Arizona, in which event this definition will encompass the District Court, as well.

1.12 Creditor: A "creditor" is every holder of a claim, whether or not such claim is an allowed claim, as defined in §1.1(10) of the Code, 11 U.S.C. §101(10).

1.13 Debtor: "Debtor" or "Debtors" shall mean Lynwood D. Hall and Brenda A. Hall.

1.14 Debtor-In-Possession: "Debtor-In-Possession," or similar phrase, shall mean the Debtor.

1.15 Effective Date: The "Effective Date" is the first business day occurring at least thirty (30) days after the date on which the Confirmation Order has become final and non-appealable with no appeal(s) then pending, except that the Debtor will have the right, but not the obligation, to treat this date as

having occurred, notwithstanding the pendency of any such appeal(s), as of any earlier date on or after the confirmation date when the Confirmation Order is in effect and not stayed pending any such appeal(s).

1.16 Plan: "Plan" means the Debtors' Plan of Reorganization, as amended or modified.

1.17 Proponent: means the person who has submitted this Plan to the Court, which in this case is the Debtor.

1.18 Undefined terms: means the meaning ascribed to such term in the Bankruptcy Code or Rules, if the term used in the Plan is not defined herein.

Section Two
Classification and Treatment of Claims and Interests

For purposes of the Plan, claims are classified and treated as follows:

2.1 Class 1: Administrative Claims

(1) Classification: Class 1 shall consist of the allowed administrative claims for actual and necessary costs and expenses of administration (except real property taxes) entitled to priority under §§ 503(b) and 507(a)(1) of the Code. Such claims include the U.S. Trustee's Office fees, the Chapter 12 trustee fees, the Chapter 12 trustee's attorneys fees

and the Debtor's attorney fees. The administrative expenses have been paid upon approval from the Court. Further expenses will be paid upon approval of such applications.

(2) Impairment: Class 1 is not impaired.

(3) Treatment: Class 1 claims which are administrative claims shall receive on account of such claims cash in the amount of such claims (i) as soon as practical on or after the Effective Date or (ii) at the option of the Debtor, in accordance with the ordinary business terms of payment of such claims. Professionals employed at the expense of the estate of the Debtor and entities who may be entitled to reimbursement or the allowance of fees and expenses from the estate of the Debtor pursuant to §§ 503(b) and 507(a)(1) of the Bankruptcy Code shall receive cash in the amount awarded to such professionals and entities at such times and only in accordance with a Final Order entered pursuant to §§ 330 and 503(b) of the Bankruptcy Code.

(4) Debtor estimates that the additional administrative fees will consist of the Chapter 12 Trustee, the Chapter 12 Trustee's attorney, and counsel for the Debtor in the total range of $5,000 to $15,000. All administrative claims shall only be paid upon Court approval.

2.2 Class 2: Secured Claim of Del Smith

(1) Classification: Class 2 consists of the secured claim of Del Smith in the approximate

amount of $23,000. Mr. Smith holds the first lien, secured by the 4699 East Parker Ranch Road residence. The approximate value of the residence is $85,000.

(2) Impairment: Class 2 is not impaired.

(3) Treatment: The Class 2 claimholder shall be paid his regular monthly payments from the income of the Debtors.

2.2A Class A: Secured Claim on Manufactured Home

(1) Classification: Class 2A consists of the secured claim on the manufactured home located on the property of the Debtors. The home is worth approximately $5,000. The secured claim is approximately $10,000.

(2) Impairment: Class 2A is not impaired.

(3) Treatment: Class 2A secured claimholder will be paid its regular monthly payments from Debtors' daughter who resides in the manufactured home.

2.3 Class 3: Secured and Unsecured claim of O. Ray Osborn and Carolyn Osborn, husband and wife in their individual capacity and as trustees of the Osborn Family Trust ("the Osborns") Dave Salyers ("Salyers) and Central Machinery Company ("Central Machinery").

(1) Classification: Class 3 consists of the secured and unsecured claim of the Osborns, which

was the subject matter of Arizona Superior Court, Cochise County, Civil Action No. CV2005-00296 and Adversary No. 05-ap-00195.

(2) Impairment: Class 3 is impaired.

(3) Treatment: The Class 3 claim has been resolved by payment to the Osborns, of the amount agreed upon pursuant to the settlement reached by the parties in Adversary Proceeding No. 05-ap-00195. Pursuant to the Amended Order Approving Settlement entered March 15, 2006 by this Court, the Osborns, Salyers and Central Machinery were paid $215,000 from the sale of the Hall farm real property. Class 3 will be paid nothing further.

2.4 Class 4: Cochise County Treasurer

(1) Classification: The Class 4 claim is the secured claim of the Cochise County Treasurer for real property taxes upon Hall Farms, which were apparently not paid at the time of the sale of the farms in the approximate amount of $2,300.

(1) Impairment: Class 4 is not impaired.

(3) Treatment: The Class 4 claim will be paid in full by the trustee as a secured claim.

2.5 Class 5: IRS Secured Claim

(1) Classification: Class 5 consists of the secured claim of the Internal Revenue Service and the Arizona Department of Revenue. The IRS has filed a proof of claim in this proceeding, alleging the secured claim in the amount of $50,465.

(2) Impairment: Class 5 is not impaired.

(3) Treatment: The Class 5 claim will be paid in full by the trustee to the extent funds are available.

2.6 Class 6: Priority Claims

(1) Classification: Class 6 Priority Claims consist of the claims filed by the Internal Revenue Service and the Arizona Department of Revenue. The IRS has filed a Proof of Claim in this proceeding, alleging a priority claim in the amount of $23,492. The Arizona Department of Revenue has also filed a priority claim in the amount of $1,452.88. Class 6 will also include a claim of approximately $29,000 to the Internal Revenue Service arising out of capital gains tax from the sale of Hall Farms during the Chapter 12. Although no Proof of Claim has been filed, this will be treated as an unsecured claim.

(2) Impairment: Class 6 is impaired.

(3) Treatment: The Class 6 claims will be paid in full to the extent funds are available. To the extent funds are not available, they will be paid pro rata and the balance discharged.

2.7 Class 7: Unsecured Claimholders.

(1) Classification: Class 7 consists of all unsecured creditors. This claim also includes the unsecured claim of Palo Verde Land and Investments in the approximate amount of $48,000 and any unsecured portion of the IRS and Arizona Department of

Revenue claims. Debtor Brenda Hall's personal liability to cast on her daughter's Suzuki will be treated as an unsecured claim.

(2) Impairment: Class 7 is impaired.

(3) Treatment: The Class 7 unsecured claims shall be paid pro rata from any proceeds following payment of senior claims. **Debtor believes that it is unlikely any funds will be available to pay any unsecured claims.** However, all unsecured creditors, if paid, will be paid pro rata.

2.8 Class 8: Interest of the Debtors

(2) [sic] Classification: Class 8 consists of the interest of the Debtors.

(3) [sic] Impairment: Class 8 is impaired.

(3) Treatment: The Class 8 claimholders shall retain their residence, subject to the Del Smith lien and their homestead exemption and all exempt personal property. In the unlikely event that all administrative, priority and unsecured claims are paid, any remaining proceeds will be distributed to the Debtors.

Income of Debtors

The net income of the Debtors for the three years following confirmation are projected to be: $0. Debtor Brenda Hall previously worked at a convenience store, but presently is unemployed. Debtor Lynwood Hall manages farm property at an annual income

projected to be less than $30,000 a year. Debtors' expenses for their home mortgage, property taxes, food, utilities, truck payment, gasoline and medicine are estimated to equal or exceed Debtor Lynwood Hall's income. The Debtors shall prove to the satisfaction of the trustee that they have no net income to contribute to the plan, except to pay their home and automobile payments.

Section Three
Treatment of Impaired Claims and Interests

All classes of claims and classes of interest are impaired under the Plan except Class 1, 2, 2A, and 4. All impaired classes of claims and classes of interest shall receive the distributions set forth in Section Two. Without limiting the foregoing and effective upon the Effective Date, each creditor and each equity security holder (or its successor) shall be deemed to have waived, relinquished and released any and all of their rights and claims against the Debtors, other than as provided for in the Plan or the Court's order confirming the Plan.

Section Four
Acceptance and Confirmation

4.1 Acceptance. Debtor intends to seek approval of the United Bankruptcy Court [sic] for its plan of reorganization. Voting by impaired class is not necessary.

4.2 Alternatives to the Plan. The Debtor believes that the Plan provides a method for Debtor to pay all claims to the most practical extent.

The alternatives to confirmation of the Plan are conversion to Chapter 7 with substantial liquidation expenses.

Section Five
Means for Execution of the Plan

5.1 Sale of Hall Farms. The Debtors have sold Hall Farms in order to raise funds to liquidate the claims of their estate.

5.2 Insurance. Debtor shall continue to insure their residence.

Section Six
Future Management of the Debtor

The Debtors Lynwood and Brenda Hall will continue to earn income, but will not operate Hall Farms as a business, and accordingly there will be no need for future management of the Debtors.

Section Seven
Other Provisions of the Plan

7.1 Retention of jurisdiction. The Bankruptcy Court shall retain exclusive jurisdiction over this case to supervise the Plan, to hear, if applicable law

provides, and to determine, among other things, the following matters:

(1) Any and all objections to the allowance of claims or interests except as provided in the Plan.

(2) Any and all applications for payment for fees from the Debtor made by attorneys and other professionals pursuant to §330 or §503 of the Bankruptcy Code, or for payment of any other fees or expenses authorized to be paid by the Debtor under §327 of the Bankruptcy Code, and any objections thereto.

(3) Any and all pending applications for rejection, the assumption, or assignment as the case may be of unexpired leases and executory contracts.

(4) Any and all motions, applications, adversary proceedings and contested or litigated matters properly before the Bankruptcy Court.

(5) Modifications of this Plan.

(6) All matters relating to the implementation or consummation of this Plan.

(7) Any and all suits or actions brought for collection or recoupment of debts or other obligations owed by defaulted partners to the Debtor.

7.2 Amendments to Plan. The Plan may be altered, amended, or modified by the Proponent before the confirmation date, in the manner provided for by § 1223 of the Bankruptcy Code or otherwise provided for by law. The Plan may also be altered,

amended, or modified by the Proponent after the Effective Date in accordance with § 1229 of the Bankruptcy Code.

7.3 Offer, Issuance and Resale of Plan Securities. Omitted.

Section Eight
Effect of Confirmation and Discharge

8.1 Except as otherwise provided in the Plan or the Confirmation Order, the Confirmation Order acts as a discharge, effective as of the Effective Date, of any and all debts of the Debtor that arose at any time before the entry of the Confirmation Order, including, but not limited to, all principal and any and all interest accrued thereon, pursuant to §§ 1222(a) and 1227 of the Bankruptcy Code, as well as any secured, priority, or unsecured portion of the IRS or Arizona Department of Revenue claims. The discharge of the Debtor shall be effective as to each claim, regardless of whether a Proof of Claim thereof was filed, whether the claim is an allowed claim, whether the holder thereof votes to accept the Plan, or its pre or post petition states the Debtors shall be discharged by the Court, except as provided in § 1228(a) of the Bankruptcy Code.

8.2 Taxes Claims. Pursuant to 11 U.S.C. § 1222 (a)2, all remaining priority or unsecured claims of the IRS and of the Arizona Department of Revenue that remain unpaid, including the post petition capital gains tax arising from the sale of Debtors' farm shall

be discharged. In the event of objection, the Court shall determine the treatment of any unpaid taxes pursuant to § 1222 at the confirmation hearing. In the event the Court treats unpaid priority claims or capital gains taxes as not discharged, they shall remain uncollectible pursuant to the IRS' Offer in Compromise process.

8.3 Debtors' social security income, when paid, and their equity, if any, in their residence shall be exempt from future claims of the IRS or the Arizona Department of Revenue.

Section Nine
Executory Contracts

9.1 There are not executory contracts or releases for the trustee to assume or reject. Next effective date, the plan shall become effective thirty (30) days after the order of confirmation by the United States Bankruptcy Court for the District of Arizona.

Section Ten
Effect of Confirmation

10.1 The Court shall retain jurisdiction of the assets of the estate, pending Debtors' discharge. The Debtor may seek modification of the plan after confirmation pursuant to § 1229 of the Bankruptcy Code upon such notices the Court shall direct. Confirmation shall bind the Debtor, and each equity security holder provided in § 1227 of the Bankruptcy Code. Except as provided by separate court order, the

confirmation of the Plan shall continue to act as a stay of any action against the Debtors or property of the estate of the Debtors.

Respectfully submitted this 8th day of June 2007.

ALTFELD BATTAILE & GOLDMAN, P.C.

By: /s/ State Bar No. 005573
Clifford B. Altfeld
Attorneys for Debtor

Lynwood D. Hall
Debtor

Brenda Hall
Debtor

DANIEL G. KNAUSS
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Attorneys for the Internal Revenue Service

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

In re: LYNWOOD D. HALL BRENDA HALL Debtors.	In Proceedings Under Chapter 12 CASE NO: 4:05-bk-04423-EWH **UNITED STATES OF AMERICA'S OBJECTION TO DEBTOR'S FIRST AMENDED PLAN OF REORGANIZATION DATED JUNE 8, 2007**

THE UNITED STATES OF AMERICA, on behalf of its agency, the Internal Revenue Service (IRS or the Service), requests that the debtors' plan be denied confirmation pursuant to 11 U.S.C. §1225

(hereinafter all statutory references are to the Bankruptcy Code unless otherwise stated).

IN SUPPORT THEREOF, the United States alleges:

1. The debtors filed their Chapter 12 petition on August 9, 2005.

2. On or about September 30, 2005, the IRS timely filed its Proof of Claim, setting forth a secured tax claim of $49,990.44, an unsecured priority claim of $73,247.15 and a general unsecured claim of $69,951.29. The IRS amended its Proof of Claim on March 6, 2007, setting forth a secured tax claim of $50,465.44, an unsecured priority claim of $23,492.02 and a general unsecured claim of $65,821.85. A copy of the March 6, 2007 Proof of Claim is attached hereto as Exhibit A.

3. It appears that the IRS is an over-secured creditor. As such, the IRS is entitled to the payment of interest that has accrued on its secured claim throughout the duration of the Chapter 12 bankruptcy proceeding. 11 U.S.C. §506(b). The IRS requests that the Court require the debtors to pay post-confirmation interest on the Service's secured claims at the statutory rate calculated pursuant to 26 U.S.C. §§ 6621 and 6622 which rate is currently set at 8%.

4. In addition, the plan is defective because it fails to provide that the Service's priority taxes under section 507(a)(8) are to be paid in deferred cash

payments in the allowed amount under § 1222(a)(2). Instead, the plan provides that the IRS priority claim will be paid in full to the "extent funds are available". Pursuant to 11 U.S.C. § 1222(a)(2), the Plan must provide for full payment of the IRS priority claim.

5. The plan provides for the payment of capital gains in the amount of $29,000.00 arising from the sale of the farm land as a priority claim. Unlike the case of an individual in a Chapter 7 or a Chapter 11 where the debtors qualify for separate entity status, a Chapter 12 bankruptcy estate is not a separate taxable entity. It is only when a bankruptcy estate is treated as a separate entity and the debtors' assets and any tax attributes pass into the bankruptcy estate does the estate become liable for payment of income taxes triggered in bankruptcy. 26 U.S.C. § 1398. Because this is a Chapter 12 bankruptcy, it is the Service's position that the debtors' post-petition income tax liabilities resulting from the sale of the farm were not incurred by the bankruptcy estate and that the payment of these tax liabilities remains the responsibility of the debtors.

6. To the extent that the plan is not providing for full payment of the IRS general unsecured claim, the IRS objects because the plan does not provide for contribution of all of the debtor's projected disposable income for the three year period beginning on the date that the first payment is due under the plan as is required by 11 U.S.C. § 1225(b).

7. The IRS objects to sections 6 and 8.1 of the plan to the extent that it seeks to discharge tax liabilities that meet the requirements of 11 U.S.C. '523(a). See 11 U.S.C. § 1228(a).

8. The IRS objects to Section 8.2 of the plan to the extent that it provides that nondischargeable tax liabilities are "uncollectible pursuant to the IRS' Offer in Compromise process".

9. The IRS further objects to Section 8.3 of the plan to the extent that it seeks to prevent the IRS from collecting non-dischargeable and post petition tax claims from property that has revested in the debtors or that never was property of the bankruptcy estate and provided for by the plan. In a Chapter 12, a discharge is granted for debts provided for in the plan "after completion by the debtor of all payments under the plan ."

10. The IRS objects to Section 10 of the Plan in that it provides that confirmation of the plan shall continue to act as an automatic stay of any action against the debtors or property of the estate. The stay of an act against property continues only until such property is no longer property of the estate. 11 U.S.C. § 362(c)(1). When the property of the estate vests back in the debtors upon confirmation, the stay no longer protects such property to the extent it is subject to post-petition creditors.

11. For the reasons stated above, the proposed plan cannot be confirmed.

WHEREFORE, it is prayed that the Court sustain this objection and deny confirmation of the proposed First Amended Chapter 12 plan

DATED this 18TH day of July, 2007.

DANIEL G. KNAUSS
United States Attorney
District of Arizona

/s/ Elizabeth Wilson (017087)
ELIZABETH WILSON
Assistant U.S. Attorney

A copy of the foregoing sent by mail and electronic mail this 18th day of July, 2007 to:

Clifford B. Altfeld
Attorney for Debtors
250 North Meyer Avenue
Tucson, Arizona 85701

Alan Costello
1440 East Missouri Ave., Suite C-170
Phoenix, Arizona 85014
Attorney for Trustee

David M. Reaves
P.O. Box 44320
Phoenix, Arizona 85064
Chapter 12 Trustee

/s/ Audrey Luetge

ORDERED

Dated: July 27, 2007 [SEAL]

/s/ Eileen W. Hollowell
EILEEN W. HOLLOWELL
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re: LYNWOOD D. HALL and BRENDA A. HALL, Debtors.	Case No. 4-05-bk-04423-EWH Chapter 12 **ORDER AUTHORIZING AND DIRECTING CHAPTER 12 TRUSTEE TO PAY SECURED CLAIMS OF THE INTERNAL REVENUE SERVICE AND COCHISE COUNTY** **Hearing date: July 25, 2007** **Hearing time: 1:30 p.m.**

This matter having come before the Court in connection with the hearing on confirmation of the Debtors' First Amended Consolidated Disclosure Statement and Plan of Reorganization Dated June 8, 2007, the Chapter 12 Trustee and Debtors, by and through their respective counsel, having requested that the secured claims of the Internal Revenue Service and Cochise County be paid immediately to

prevent the accrual of interest thereon, no objections to the payment of such claims having been asserted, Trustee's counsel having certified to the Court that the estate holds sufficient funds to pay the secured claims of the Internal Revenue Service and Cochise County in full, and good cause appearing,

IT IS HEREBY ORDERED:

1. Authorizing and directing the Chapter 12 Trustee to pay the Internal Revenue Service $15,356.42 in full satisfaction of its secured claim for 1990 taxes on or before July 27, 2007.

2. Authorizing and directing the Chapter 12 Trustee to pay the Internal Revenue Service $43,114.34 in full satisfaction of its secured claim for 1991 taxes on or before July 27, 2007.

3. Authorizing and directing the Chapter 12 Trustee to immediately pay the Cochise County Treasurer $1,410.68 in full satisfaction of its secured claim for 2005/2006 real property taxes for Tax Parcel No. 205-47-002-00-9.

4. This Order is effective as of July 25, 2007.

DATED: _____

_____

HONORABLE
EILEEN W. HOLLOWELL
UNITED STATES
BANKRUPTCY COURT JUDGE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re	)	Chapter 12
LYNWOOD D. HALL and BRENDA HALL,	)	Case No. 4-05-bk-04423-EWH
	)	**ORDER**
Debtors.	)	(Filed Oct. 2, 2007)

For the reasons set forth in the Memorandum Decision of even date, the Internal Revenue Service's objection to Debtors' First Amended Plan of Reorganization is sustained.

Dated this 2nd day of October, 2007.

/s/ Eileen W. Hollowell
EILEEN W. HOLLOWELL
UNITED STATES
BANKRUPTCY JUDGE

Copies of the foregoing mailed this
2nd day of October, 2007, to:

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Phoenix, AZ 85064
Chapter 12 Trustee

Denise Faulk, Esq.
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Attorneys for the Arizona Department of Revenue

By /s/ [Illegible]
Judicial Assistant

DAVID M. REAVES
Chapter 12 Trustee
Post Office Box 44320
Phoenix, Arizona 85064
(602) 241-0101 Telephone

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re:	) Case No. 4-05-bk-04423-EWH
HALL, LYNWOOD D. and HALL, BRENDA,	) Chapter 12
Debtors.	) **TRUSTEE'S INTERIM REPORT MAY, 2011**

DAVID M. REAVES was appointed Chapter 12 trustee of the above referenced case on August 9, 2005, and hereby submits the following report for the month of May, 2011:

Confirmation of the Debtors' Chapter 12 Plan of Reorganization was denied by the Court. The Debtors' appealed this decision to the District Court, which overturned the order denying confirmation. The IRS then appealed to the Ninth Circuit Court of Appeals, and on August 16, 2010, the Ninth Circuit reversed the District Court and upheld the order of this Court denying confirmation of the Debtor's plan. The Debtors then filed a motion for rehearing with the Ninth Circuit. The Debtors' motion for rehearing was denied on October 1, 2010. The Ninth Circuit granted a stay of its mandate for 90 days, to allow the Debtors to file

a Writ of Certiorari with the U.S. Supreme Court. On December 30, 2010, the Debtors filed their Writ of Certiorari. Until the appellate issues are resolved, this matter cannot move forward.

The estate is holding funds from the sale of real property. The only deposit made since the filing of Trustee's previous Interim Report was interest paid by the bank. The following is a recap of the receipts and disbursements made by the Trustee:

FUNDS RECEIVED

Net proceeds from sale of real property	$422,229.59
Interest through May 31, 2011	5,177.70
Total Receipts	$427,407.29

DISBURSEMENTS

Settlement proceeds paid to O. Ray Osborn and Carolyn Osborn	$215,000.00
International Sureties	250.00
Administrative Fees and Costs paid to:	
David M. Reaves, Chapter 12 Trustee	
Administrative Fees	19,367.50
Administrative Costs	408.18
Costello Law Firm, Attorney for Trustee	
Attorney's Fees	27,600.00
Attorney's Costs	408.82

Leonard, Felkeer, Altfeld, Bautaulle [sic], & Goldman, PLC, Attorney for Debtor	
Attorney's Fees	58,400.00
Attorney's Costs	2,065.26
International Sureties	120.00
Internal Revenue Service (1990 taxes)	15,356.42
Internal Revenue Service (1991 taxes)	43,114.34
Cochise County Treasurer	1,410.68
Linda Olsen	1,405.00
Total Disbursements	$384,906.20
BALANCE HELD	$42,501.09

Dated this 1st day of July, 2011.

By: /s/ David M. Reaves
David M. Reaves,
Chapter 12 Trustee

COPY of the foregoing MAILED this 1st day of July, 2011, to:

Lynwood and Brenda Hall
4699 E. Parker Ranch Rd.
Wilcox, AZ 85643
Debtors

Clifford B. Altfeld
250 N. Meyer Ave.
Tucson, AZ 85701-1090
Attorney for Debtors

Office of the U.S. Trustee
230 N. First Avenue, Ste. 204
Phoenix, AZ 85003

/s/ Kathleen Arnold

FORM 2
ESTATE CASH RECEIPTS AND DISBURSEMENTS RECORD

ase No:	05-04423 – EWH	**Trustee Name:**	DAVID M. REAVES – CH 12
ase Name:	HALL, LYNWOOD D. BRENDA HALL	**Bank Name:**	JPMORGAN CHASE BANK, N.A.
		Account Number / CD #:	********8265 Money Market Account
axpayer ID No:	********9726	**Blanket Bond (per case limit):**	$ 0.00
or Period Ending:	05/31/11	**Separate Bond (if applicable):**	

1 ransaction Date	2 Check or Reference	3 Paid To / Received From	4 Description Of Transaction	Uniform Tran. Code	5 Deposits ($)	6 Disbursements ($)	7 Account / CD Balance ($)
			BALANCE FORWARD				0.00
10/06/05		First American Title	**Proceeds from sale of farm.**		422,229.59		422,229.59
			DEPOSIT CHECK #242321765				
		COCHISE COUNTY TREASURER	**Memo Amount: (559.14)**	4700-000			
			County Tax				
		SUNSTATE BANK	**Memo Amount: (68,381.48)**	4110-000			
			Loan Payoff				
		SUNSTATE BANK	**Memo Amount: (3,056.94)**	4110-000			
			Interest on loan payoff				
		SUNSTATE BANK	**Memo Amount: (83.10)**	4110-000			
			Per diem interest				
		SUNSTATE BANK	**Memo Amount: (37,384.61)**	4110-000			
			Loan payoff				
		SUNSTATE BANK	**Memo Amount: (1,133.46)**	4110-000			
			Interest on loan payoff				
		SUNSTATE BANK	**Memo Amount: (45.45)**	4110-000			
			Per diem interest				
		FIRST NATIONAL EQUIPMENT FUNDING	**Memo Amount: (28,720.88)**	4110-000			
			Loan payoff				
		FIRST AMERICAN TITLE	**Memo Amount: (40.00)**	2500-000			
			Overnight delivery charge				
		FIRST AMERICAN TITLE	**Memo Amount: (527.00)**	2500-000			
			Escrow Fees				
		FIRST AMERICAN TITLE	**Memo Amount: (2,608.00)**	2500-000			
			Title Insurance				
		FIRST AMERICAN TITLE	**Memo Amount: (200.00)**	2500-000			
			Additional Escrow Fees				
		FIRST AMERICAN TITLE	**Memo Amount: (25.00)**	2500-000			
			Record fee – First American Title				
		COCHISE COUNTY TREASURER	**Memo Amount: (5.35)**	4700-000			
			Page Subtotals		422,229.59	0.00	

FORM 2
ESTATE CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No: 05-04423 -- EWH
Case Name: HALL, LYNWOOD D.
BRENDA HALL
Taxpayer ID No: *******9726
For Period Ending: 05/31/11

Trustee Name: DAVID M. REAVES – CH 12
Bank Name: JPMORGAN CHASE BANK, N.A.
Account Number / CD #: *******8265 Money Market Account
Blanket Bond (per case limit): $ 0.00
Separate Bond (if applicable):

1	2	3	4		5	6	7
Transaction Date	Check or Reference	Paid To / Received From	Description Of Transaction	Uniform Tran. Code	Deposits ($)	Disbursements ($)	Account / CD Balance ($)
		O. RAY & CAROLYN OSBORN	2004 tax installment Memo Amount: (400,000.00) Contested lien Payoff Partial payment of contested lien per settlement agreement	4120-000			
	1	THE PICNIC BARREL LIQUOR MART, INC	Memo Amount: 960,000.00 Gross Sale Proceeds	1110-000			
10/31/05	INT	JPMORGAN CHASE BANK, N.A.	Interest posting at 0.5500%	1270-000	119.63		422,349.22
11/30/05	INT	JPMORGAN CHASE BANK, N.A.	Interest posting at 0.5500%	1270-000	190.97		422,540.19
12/30/05	INT	JPMORGAN CHASE BANK, N.A.	Interest posting at 0.6500%	1270-000	211.32		422,751.51
01/31/06	INT	JPMORGAN CHASE BANK, N.A.	Interest posting at 0.7000%	1270-000	238.08		422,989.59
02/28/06	INT	JPMORGAN CHASE BANK, N.A.	Interest posting at 0.7000%	1270-000	227.20		423,216.79
03/17/06	001001	O. Ray Osborn and Carolyn Osborn c/o Snell & Wilmer, L.L.P. One S. Chruch [sic] Ave., Ste. 1500 Tucson, AZ 85701-1630	Settlement Agreement	7100-000		215,000.00	208,216.79
03/31/06	INT	JPMORGAN CHASE BANK, N.A.	INTEREST REC'D FROM BANK	1270-000	218.69		208,435.48
04/19/06	INT	JPMORGAN CHASE BANK, N.A.	INTEREST REC'D FROM BANK	1270-000	77.11		208,512.59
04/19/06		Transfer to Acct #*******3186	Bank Funds Transfer	9999-000		208,512.59	0.00

Memo Allocation Receipts:	960,000.00	COLUMN TOTALS	423,512.59	423,512.59		0.00
Memo Allocation Disbursements:	537,770.41	Less: Bank Transfers/CD's	0.00	208,512.59		
		Subtotal	423,512.59	215,000.00		
Memo Allocation Net:	422,229.59	Less: Payments to Debtors		0.00		
		Net	423,512.59	215,000.00		
		Page Subtotals	1,283.00	423,512.59		

FORM 2
ESTATE CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No: 05-04423 – EWH
Case Name: HALL, LYNWOOD D.
BRENDA HALL
Taxpayer ID No: *******9726
For Period Ending: 05/31/11

Trustee Name: DAVID M. REAVES – CH 12
Bank Name: BANK OF AMERICA, N.A.
Account Number / CD #: *******3186 TIP Account
Blanket Bond (per case limit): $ 0.00
Separate Bond (if applicable):

1	2	3	4		5	6	7
Transaction Date	Check or Reference	Paid To / Received From	Description Of Transaction	Uniform Tran. Code	Deposits ($)	Disbursements ($)	Account / CD Balance ($)
			BALANCE FORWARD				0.00
04/19/06		Transfer from Acct #*******8285	Bank Funds Transfer	9999-000	208,512.59		208,512.59
04/28/06	INT	BANK OF AMERICA, N.A.	Interest Rate 1.500	1270-000	77.11		208,589.70
05/31/06	INT	BANK OF AMERICA, N.A.	Interest Rate 1.500	1270-000	265.75		208,855.45
06/30/06	INT	BANK OF AMERICA, N.A.	Interest Rate 1.500	1270-000	257.49		209,112.94
07/12/06	000301	INTERNATIONAL SURETIES, LTD 203 CARONDELET ST., STE. 500 NEW ORLEANS, LA 70130	CHAPTER 12 BOND	2300-000		250.00	208,862.94
07/31/06	INT	BANK OF AMERICA, N.A.	Interest Rate 1.500	1270-000	266.26		209,129.20
08/31/06	INT	BANK OF AMERICA, N.A.	Interest Rate 1.500	1270-000	266.42		209,395.62
09/29/06	INT	BANK OF AMERICA, N.A.	Interest Rate 1.500	1270-000	258.15		209,653.77
10/31/06	INT	BANK OF AMERICA, N.A.	Interest Rate 1.500	1270-000	267.10		209,920.87
11/30/06	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	261.68		210,182.55
12/29/06	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	312.39		210,494.94
01/31/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	312.86		210,807.80
01/31/07		Transfer to Acct #*******9800	Bank Funds Transfer	9999-000		93,158.18	117,649.62
02/28/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	157.94		117,807.56
03/30/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	175.09		117,982.65
04/30/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	169.71		118,152.36
05/31/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	175.61		118,327.97
06/14/07	000302	INTERNATIONAL SURETIES, LTD. 206 CARONDELET ST., STE. 500 NEW ORLEANS, LA 70130	TRUSTEE BOND	2300-000		120.00	118,207.97
06/29/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	170.16		118,378.13
07/24/07		Transfer to Acct #*******9800	Bank Funds Transfer	9999-000		15,091.58	103,286.55
* 07/25/07	000303	INTERNAL REVENUE SERVICE	1990 TAXES	4700-003		15,356.42	87,930.13
* 07/25/07	000303	INTERNAL REVENUE SERVICE	1990 TAXES Check drawn on incorrect account. Should have been taken from checking account.	4700-003		-15,356.42	103,286.55
07/25/07		Transfer to Acct #*******9800	Bank Funds Transfer	9999-000		59,881.44	43,405.11
			Page Subtotals		211,906.31	168,501.20	

FORM 2
ESTATE CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No:	05-04423 – EWH	**Trustee Name:**	DAVID M. REAVES – CH 12
Case Name:	HALL, LYNWOOD D. BRENDA HALL	**Bank Name:**	BANK OF AMERICA, N.A.
		Account Number / CD #:	********8186 TIP Account
Taxpayer ID No:	*******9726	**Blanket Bond (per case limit):**	$ 0.00
For Period Ending:	05/31/11	**Separate Bond (if applicable):**	

1	2	3	4		5	6	7
Transaction Date	Check or Reference	Paid To / Received From	Description Of Transaction	Uniform Tran. Code	Deposits ($)	Disbursements ($)	Account / CD Balance ($)
07/31/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	150.07		43,555.18
08/31/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.750	1270-000	64.74		43,619.92
09/28/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.500	1270-000	53.05		43,672.97
10/31/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.300	1270-000	48.23		43,721.20
11/30/07	INT	BANK OF AMERICA, N.A.	Interest Rate 1.300	1270-000	46.72		43,767.92
12/31/07	INT	BANK OF AMERICA, N.A.	Interest Rate 0.500	1270-000	30.28		43,798.20
01/10/08		Transfer to Acct #********9800	Bank Funds Transfer	9999-000		1,405.00	42,393.20
01/31/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.400	1270-000	16.97		42,410.17
02/29/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.300	1270-000	10.08		42,420.25
03/31/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.250	1270-000	10.03		42,430.28
04/30/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.250	1270-000	8.69		42,438.97
05/30/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.150	1270-000	5.39		42,444.36
06/30/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.150	1270-000	5.22		42,449.58
07/31/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.150	1270-000	5.39		42,454.97
08/29/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.150	1270-000	5.39		42,460.36
09/30/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.150	1270-000	5.23		42,465.59
10/31/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.100	1270-000	4.12		42,469.71
11/28/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.100	1270-000	3.48		42,473.19
12/31/08	INT	BANK OF AMERICA, N.A.	Interest Rate 0.010	1270-000	2.14		42,475.33
01/30/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.010	1270-000	0.36		42,475.69
02/27/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.010	1270-000	0.33		42,476.02
03/31/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.010	1270-000	0.36		42,476.38
04/30/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	0.93		42,477.31
05/29/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.07		42,478.38
06/30/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.06		42,479.44
07/31/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.08		42,480.52
08/31/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.08		42,481.60
09/30/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.05		42,482.65
10/30/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.08		42,483.73
			Page Subtotals		483.62	1,405.00	

FORM 2
ESTATE CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No:	*05-04423 – EWH*	**Trustee Name:**	DAVID M. REAVES – CH 12
Case Name:	HALL, LYNWOOD D.	**Bank Name:**	BANK OF AMERICA, N.A.
	BRENDA HALL	**Account Number / CD #:**	********3186 TIP Account
Taxpayer ID No:	********9726	**Blanket Bond (per case limit):**	$ 0.00
For Period Ending:	05/31/11	**Separate Bond (if applicable):**	

1	2	3	4		5	6	7
Transaction Date	Check or Reference	Paid To / Received From	Description Of Transaction	Uniform Tran. Code	Deposits ($)	Disbursements ($)	Account / CD Balance ($)
11/30/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.05		42,484.78
12/31/09	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.08		42,485.86
01/29/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.07		42,486.93
02/26/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	0.98		42,487.91
03/31/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.09		42,489.00
04/30/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.05		42,490.05
05/28/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.08		42,491.13
06/30/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.05		42,492.18
07/30/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.08		42,493.26
08/31/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.09		42,494.35
09/30/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.05		42,495.40
10/29/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.07		42,496.47
11/30/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.06		42,497.53
12/31/10	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.08		42,498.61
01/31/11	INT	BANK OF AMERICA, N.A.	Interest Rate 0.030	1270-000	1.08		42,499.69
02/28/11	INT	BANK OF AMERICA, N.A.	Interest Rate 0.010	1270-000	0.33		42,500.02
03/31/11	INT	BANK OF AMERICA, N.A.	Interest Rate 0.010	1270-000	0.36		42,500.38
04/29/11	INT	BANK OF AMERICA, N.A.	Interest Rate 0.010	1270-000	0.35		42,500.73
05/31/11	INT	BANK OF AMERICA, N.A.	Interest Rate 0.010	1270-000	0.36		42,501.09

Memo Allocation Receipts:	0.00	COLUMN TOTALS	212,407.29	169,906.20	42,501.09
Memo Allocation Disbursements:	0.00	**Less: Bank Transfers/CD's**	208,512.59	169,536.20	
		Subtotal	3,894.70	370.00	
Memo Allocation Net:	0.00	**Less: Payments to Debtors**		0.00	
		Net	3,894.70	370.00	
		Page Subtotals	17.36	0.00	

FORM 2

ESTATE CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No: 05-04423 – EWH
Case Name: HALL, LYNWOOD D.
BRENDA HALL
Taxpayer ID No: *******9726
For Period Ending: 05/31/11

Trustee Name: DAVID M. REAVES – CH 12
Bank Name: BANK OF AMERICA, N.A.
Account Number / CD #: ********9800 Checking Account
Blanket Bond (per case limit): $ 0.00
Separate Bond (if applicable):

1	2	3	4		5	6	7
Transaction Date	Check or Reference	Paid To / Received From	Description Of Transaction	Uniform Tran. Code	Deposits ($)	Disbursements ($)	Account / CD Balance ($)
			BALANCE FORWARD				0.00
01/31/07		Transfer from Acct #********3186	Bank Funds Transfer	9999-000	93,158.18		93,158.18
02/01/07	003001	DAVID M. REAVES CHAPTER 12 TRUSTEE POST OFFICE BOX 44320 PHOENIX, AZ 85064	ADMINISTRATIVE FEES	2100-000		14,025.00	79,133.18
02/01/07	003002	DAVID M. REAVES CHAPTER 12 TRUSTEE POST OFFICE BOX 44320 PHOENIX, AZ 85064	ADMINISTRATIVE EXPENSE – COSTS	2200-000		321.97	78,811.21
02/01/07	003003	ALAN R. COSTELLO COSTELLO LAW FIRM 1440 EAST MISSOURI AVE, STE. C-170 PHOENIX, AZ 85014	ATTORNEY FOR TRUSTEE FEES	3210-000		18,075.00	60,736.21
02/01/07	003004	ALAN R. COSTELLO COSTELLO LAW FIRM 1440 EAST MISSOURI AVE, STE. C-170 PHOENIX, AZ 85014	ATTORNEY FOR TRUSTEE EXPENSES	3220-000		270.95	60,465.26
* 02/01/07	003005	CLIFFORD ALTFELD P.O. BOX 191 TUCSON, AZ 85702	ATTORNEY FOR DEBTOR FEES	3701-003		58,400.00	2,065.26
* 02/01/07	003005	CLIFFORD ALTFELD P.O. BOX 191 TUCSON, AZ 85702	ATTORNEY FOR DEBTOR FEES Pay to the Order of did not include the name of the firm so reissued to include name of firm – voided check is in the file.	3701-003		-58,400.00	60,465.26
02/01/07	003006	CLIFFORD ALTFELD LEONARD FELKER ALTFELD BAUTAULLE & GOLDMAN, PLC P.O. BOX 191 TUCSON, AZ 85702	ATTORNEY FOR DEBTOR EXPENSES	3702-000		2,065.26	58,400.00
			Page Subtotals		93,158.18	34,758.18	

FORM 2

ESTATE CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No:	05-04423 – EWH	**Trustee Name:**	DAVID M. REAVES – CH 12
Case Name:	HALL, LYNWOOD D. BRENDA HALL	**Bank Name:**	BANK OF AMERICA, N.A.
		Account Number / CD #:	••••••••9800 Checking Account
Taxpayer ID No:	••••••••9726	**Blanket Bond (per case limit):**	$ 0.00
For Period Ending:	05/31/11	**Separate Bond (if applicable):**	

1	2	3	4		5	6	7
Transaction Date	Check or Reference	Paid To / Received From	Description Of Transaction	Uniform Tran. Code	Deposits ($)	Disbursements ($)	Account / CD Balance ($)
02/01/07	003007	CLIFFORD ALTFELD LEONARD FELKER (sic) ALTFELD BAUTAULLE & GOLDMAN, PLC P.O. BOX 191 TUCSON, AZ 85702	ATTORNEY FOR DEBTOR FEES	3701-000		58,400.00	0.00
07/24/07		Transfer from Acct #••••••••3186	Bank Funds Transfer	9999-000	15,091.58		15,091.58
07/24/07	003008	TRUSTEE DAVID M. REAVES P.O. BOX 44320 PHOENIX, AZ 85064	CHAPTER 12 TRUSTEE FEES	2100-000		5,342.50	9,749.08
07/24/07	003009	TRUSTEE DAVID M. REAVES P.O. BOX 44320 PHOENIX, AZ 85064	CHAPTER 12 TRUSTEE EXPENSES	2200-000		86.21	9,662.87
07/24/07	003010	ALAN R. COSTELLO COSTELLO LAW FIRM 1440 EAST MISSOURI AVE, STE. C-170 PHOENIX, AZ 85014	ATTORNEY FOR TRUSTEE FEES	3210-000		9,525.00	137.87
07/24/07	003011	ALAN R. COSTELLO COSTELLO LAW FIRM 1440 EAST MISSOURI AVE, STE. C-170 PHOENIX, AZ 85014	ATTORNEY FOR TRUSTEE EXPENSES	3220-000		137.87	0.00
07/25/07		Transfer from Acct #••••••••3186	Bank Funds Transfer	9999-000	59,881.44		59,881.44
07/25/07	003012	INTERNAL REVENUE SERVICE	1990 TAXES	4700-000		15,356.42	44,525.02
07/25/07	003013	INTERNAL REVENUE SERVICE	1991 TAXES	4700-000		43,114.34	1,410.68
07/25/07	003014	COCHISE COUNTY TREASURER	205-47-002-009	4700-000		1,410.68	0.00
01/10/08		Transfer from Acct #••••••••3186	Bank Funds Transfer	9999-000	1,405.00		1,405.00
01/31/08	003015	LINDA OLSEN	Debtor Accountant	3310-000		1,405.00	0.00
			Page Subtotals		76,378.02	134,778.02	

FORM 2
ESTATE CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No: 05-04423 – EWH
Case Name: HALL, LYNWOOD D.
BRENDA HALL
Taxpayer ID No: *******9726
For Period Ending: 05/31/11

Trustee Name: DAVID M. REAVES – CH 12
Bank Name: BANK OF AMERICA, N.A.
Account Number / CD #: *******9800 Checking Account
Blanket Bond (per case limit): $ 0.00
Separate Bond (if applicable):

1 Transaction Date	2 Check or Reference	3 Paid To / Received From	4 Description Of Transaction	Uniform Tran. Code	5 Deposits ($)	6 Disbursements ($)	7 Account / CD Balance ($)
			COLUMN TOTALS		169,536.20	169,536.20	0.00
			Less: Bank Transfers/CD's		169,536.20	0.00	
			Subtotal		0.00	169,536.20	
			Less: Payments to Debtors			0.00	
			Net		0.00	169,536.20	

			NET DEPOSITS	NET DISBURSEMENTS	ACCOUNT BALANCE
Memo Allocation Receipts:	0.00	TOTAL – ALL ACCOUNTS			
Memo Allocation Disbursements:	0.00	Money Market Account – *******8265	423,512.59	215,000.00	0.00
Memo Allocation Net:	0.00	TIP Account – *******3186	3,894.70	370.00	42,501.09
Total Allocation Receipts:	960,000.00	Checking Account – *******9800	0.00	169,536.20	0.00
Total Allocation Disbursements:	537,770.41		427,407.29	384,906.20	42,501.09
Total Memo Allocation Net:	422,229.59		(Excludes Account Transfers)	(Excludes Payments To Debtors)	Total Funds On Hand
		Page Subtotals	0.00	0.00	

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 10-875

Supreme Court, U.S.
FILED
AUG 17 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LYNWOOD D. HALL and BRENDA A. HALL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF FOR PETITIONERS

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTION PRESENTED

Chapter 12 of the Bankruptcy Code permits family farmers to reorganize their debts. After filing a Chapter 12 petition, Petitioners sold their family farm with the consent of their bankruptcy trustee and court approval, and with sale proceeds administered through the bankruptcy estate to pay creditors. The sale of the farm generated taxable capital gains. In 2005, Congress modified Chapter 12 by enacting Bankruptcy Code 1222(a)(2), which excepts from the priority scheme established in Bankruptcy Code Section 507 claims by the government, including claims for taxes, arising from the sale of farm assets. Specifically, taxes covered by Section 1222(a)(2)(A) are deemed nonpriority, unsecured claims, which need not be paid in full if the estate is insufficient. The Ninth Circuit held that Internal Revenue Code Section 1399, which provides that a bankruptcy other than an individual Chapter 7 or individual Chapter 11 case does not give rise to a "separate taxable entity," strips taxes on postpetition farm sales from Section 1222(a)(2)(A)'s coverage. The question presented is whether Section 1222(a)(2)(A)'s reference to "claims entitled to priority under section 507" means all tax claims described in Section 507, including taxes on postpetition sales, or whether, instead, the Ninth Circuit was correct that Congress meant for an entirely separate section of the IRC to impliedly remove one of the key portions of Section 507 from Section 1222(a)(2)(A)'s special protections.

LIST OF PARTIES

Lynwood D. Hall and Brenda A. Hall are the petitioners. The United States of America is the respondent.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 617 F.3d 1161 (9th Cir. 2010) and set forth at Petition Appendix ("Pet. App.") 1. The August 6, 2008 order of the United States District Court for the District of Arizona is reported at 393 B.R. 857 (D. Ariz. 2008), and set forth at Pet. App. 18. The October 7, 2007 memorandum decision of the United States Bankruptcy Court for the District of Arizona is reported at 376 B.R. 741 (Bankr. D. Ariz. 2007) and set forth at Pet. App. 34.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Bankruptcy Court and District Court were invoked under 28 U.S.C. §§ 157, 158, and 1334. The dates of relevant orders are at Pet. 1.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Bankruptcy Code (11 U.S.C. §§ 101 *et seq.*), the principal sections of which are 11 U.S.C. §§ 503(b)(1)(B)(i), 507(a)(2), 507(a)(8), and 1222(a)(2)(A); and the Internal Revenue Code ("IRC"), 26 U.S.C. §§ 1 *et seq.*, the principal sections of which are 26 U.S.C. §§ 1398 and 1399. Relevant

provisions of the United States Bankruptcy Code and IRC are set forth in full in Pet. App. 49-55 and the Appendix.

STATEMENT OF THE CASE

Lynwood and Brenda Hall owned and operated a 320-acre farm in Willcox, Arizona (the "Hall Farm"). On August 9, 2005, they filed a petition for bankruptcy relief as family farmers under Chapter 12 of the Bankruptcy Code. 11 U.S.C. §§ 1201-1231; J.A. 26. Chapter 12 is a special Chapter of the Bankruptcy Code for family farmers, intended to make it easier for them to reorganize their financial affairs. Chapter 11 reorganizations impose difficult plan requirements and prevent many asset sales without secured creditor consent, and Chapter 13 wage-earner reorganizations have lower debt eligibility thresholds than many farmers can meet, do not provide for asset sales during case administration, and cannot be used by farmers operating as partnerships or corporations. Chapter 12 helps family farmers over these bankruptcy hurdles. They operate farms as debtors-in-possession with limited trustee involvement, and confirm reorganization plans.

Prior to filing their bankruptcy petition, the Halls had contracted to sell the Hall Farm for $960,000. J.A. 26. The sale was complicated by the fact that the Hall Farm secured a disputed claim of Brenda Hall's father, his wife and their family trust (the "Osborns"),

and the Osborns had filed a state court foreclosure action that would have enabled them to recover all the Hall Farm value. J.A. 26-27.

Chapter 12 authorizes the sale of bankruptcy estate assets free and clear of secured creditor liens. 11 U.S.C. § 1206. The Halls moved for Bankruptcy Court authority to proceed with the Hall Farm sale and the Osborns objected. J.A. 20. Thereafter, the Halls and the Osborns, with the consent of the Chapter 12 trustee, agreed to go forward with the sale on the conditions that $400,000 would be paid from escrow to the Osborns, and the Osborns' claims and Halls' counterclaims would be resolved thereafter by the court. The Bankruptcy Court approved this agreement. *Id.* After payment of a bank crop lien claim, closing costs and the $400,000 payment to the Osborns, the Chapter 12 trustee held the remaining sale proceeds of $422,229.59. J.A. 22, 53.

After substantial litigation and mediation, the Halls and Osborns settled, with the Osborns receiving an additional $215,000. J.A. 27, 53. From the remaining estate funds, the Halls and the Chapter 12 trustee obtained Bankruptcy Court approval to pay the Internal Revenue Service ("IRS" or the "Government") $58,470.76 and Cochise County $1,410.68 for secured claims resulting from prepetition taxes. J.A. 48-49.

Most Bankruptcy Code provisions apply in Chapter 12 cases, including Sections 507 and 503, which give certain kinds of unsecured claims "priority"

rights to payment from bankruptcy estate assets before other unsecured claims. 11 U.S.C. § 103(a). Priority claims are given preferential treatment due to Congress's determination that those claims are more important than others. "Administrative expenses," the costs of operating and administering bankruptcy estate assets, have the highest priority of payment second only to domestic support obligations such as child support. 11 U.S.C. § 507(a)(2). These include fees of any trustee, the debtor's attorneys, and costs of operating a farm or other business during the period of bankruptcy estate administration before a reorganization plan is confirmed. Certain taxes are also administrative expenses.

The sale price of the Hall Farm exceeded the Halls' basis in the assets, resulting in capital gains. The presumptive tax on these gains, under applicable prevailing rates in the IRC, was approximately $29,000. J.A. 35. Effective April 20, 2005, however, Congress enacted a special provision of Chapter 12 so that a priority tax claim resulting from the sale of "any farm asset used in the debtor's farming operation" could be treated as an unsecured claim and discharged. 11 U.S.C. § 1222(a)(2)(A).

The IRS did not file an administrative expense claim for the capital gains tax. Governmental units are not required to file such claims for taxes to be treated as administrative expenses. 11 U.S.C. § 503(b)(1)(D). The Halls, relying on Section 1222(a)(2)(A), filed an amended plan providing for the tax to be treated as an unsecured claim and paid pro rata to the extent

funds were available after satisfying higher priority claims. *See* J.A. 35, 40-41.

The IRS objected to the debtors' plan based on IRC 1399. Pet. App. 35. It states that no "separate taxable entity" results from the commencement of a bankruptcy case under any Chapter of the Bankruptcy Code except for Chapter 7 liquidation or Chapter 11 reorganization cases of individual debtors. *See* 26 U.S.C. § 1399. According to the IRS, the postpetition capital gains tax was not an administrative expense under Bankruptcy Code 507(a)(2) and 503(b), and therefore not covered by Section 1222(a)(2)(A), because it was not "incurred by the estate" as required to qualify as an administrative expense claim in the Halls' bankruptcy case. The IRS argued instead that it was an obligation of the Halls individually to be paid from non-bankruptcy estate assets, and could not be discharged under their Chapter 12 reorganization plan. *See* Pet. App. 35, J.A. 45. Without administrative expense status, the IRS claimed, Bankruptcy Code 1222(a)(2)(A) is simply inapplicable to postpetition tax claims due to the sale of bankruptcy estate assets, so debtors like the Halls have to pay the entire capital gains tax as though it arose outside the bankruptcy. *See* Pet. App. 40.

The Bankruptcy Court agreed with the IRS and sustained the Government's objection. *See* Pet. App. 46, J.A. 50. On appeal, the District Court reversed the Bankruptcy Court. *See* Pet. App. 32-33. The Ninth Circuit, in a 2-1 decision, agreed with the Bankruptcy Court, and reversed the District Court. *See id.* 6, 16.

The Ninth Circuit recognized that its decision created a circuit split with *Knudsen v. IRS*, 581 F.3d 696 (8th Cir. 2009), which reached an opposite conclusion. Pet. App. 9.

During this litigation, the Chapter 12 trustee has used additional Hall Farm sale proceeds to pay court-approved fees and costs of the Chapter 12 trustee, the trustee's attorney, accountant, the trustee's bond premiums, and the Halls' bankruptcy attorney, leaving a balance of approximately $42,500. J.A. 54. Other claims including priority claims have not been paid, and there are insufficient funds to satisfy the entire capital gains tax in full as an unsecured claim. *See* J.A. 36-37. The Halls would lose their home if forced to pay the IRS outside their plan for the capital gains tax generated from the Hall Farm sale because tax liens are not subject to state law homestead exemptions. *See* 26 U.S.C. § 6334(c); *United States v. Mitchell*, 403 U.S. 190, 204-05 (1971).

SUMMARY OF ARGUMENT

By the plain language of Bankruptcy Code 1222(a)(2)(A) and the Sections cross-referenced therein – 507(a) and through it 503(b)(1)(B) – taxes based on sales of farm assets during a Chapter 12 bankruptcy case are entitled to be treated as non-priority unsecured claims. Section 1222(a)(2)(A) provides that, so long as a tax claim is one that is entitled to priority under Section 507, it will be stripped of that priority

status if it arises from the sale of farm assets. Although resolution of this case requires travel through cross-referenced sections of the Bankruptcy Code, in the end, the language is clear. The tax generated upon the sale was a Section 503(b) "administrative expense" claim; it is entitled to second-level priority under Section 507; and the tax therefore is excepted from such priority by Section 1222(a)(2)(A).

The Ninth's Circuit's opinion to the contrary is, in a word, strained. It held that Section 1222(a)(2)(A) applies only to taxes specified in Section 507(a)(8). Pet. App. 4-6. Not only does this position disregard Sections 507(a)(2) and 503(b)(i)(B), but it also cannot be squared with the statutory scheme. Section 507(a)(8) was amended at the same time Section 1222(a)(2)(A) was enacted in 2005. At that time, there was confusion whether Section 507(a)(8) should be read to give eighth-level priority to claims for taxes incurred prepetition but during the year in which a bankruptcy case was filed (the "straddle year"), instead of the higher priority given to administrative expense claims. Congress amended Section 507(a)(8) to make clear that all taxes incurred during the tax year in which the bankruptcy petition occurs are ***not*** covered by Section 507(a)(8) and must be treated as administrative expenses (and thus have higher priority). So understood, the holding that Section 1222(a)(2)(A)'s special protections only apply to claims covered by Section 507(a)(8) means that in order to obtain the exception from priority claim status for a sale of farm assets under Section 1222(a)(2)(A),

a farmer would have to sell his farm many months before bankruptcy – that is, sufficiently far enough in advance that Section 507(a)(8), as amended, would apply. Far more logical and harmonious with Congress's purpose is the unstrained interpretation – that Section 1222(a)(2)(A) applies to administrative expense tax claims.

The underlying rationale for the Ninth Circuit's conclusion is a belief that taxes resulting from sales of bankruptcy estate assets are not administrative expense claims unless the debtor's estate is a "separate taxable entity" under the IRC. This holding cannot be squared with decades of decisions to the contrary from this Court in single taxable entity cases and evidence of legislative intent to continue that policy. It also erroneously uses a 1980 IRC provision that created separate taxable entities in some bankruptcy cases to construe a 1978 Bankruptcy Code provision regarding payment priority from bankruptcy estate assets in all cases, again contrary to principles established by this Court. The rationale for the IRC provision does not support that construction or justify disrupting the priority scheme for claim payments in bankruptcy cases.

More fundamentally, the Ninth Circuit's opinion conflates two distinct laws with separate purposes. The IRC determines what transactions are taxable and in what amounts. The Bankruptcy Code determines priority of distributions of estate assets to pay claims, with postpetition taxes and other administrative expense claims next to the top. The IRC provision

for a single taxable entity in some cases and a separate taxable entity in others has nothing to do with the priority with which estate assets are distributed among different classes of claimants. The IRS has long argued for administrative expense treatment of taxes incurred due to transactions involving bankruptcy estate assets, consistent with decisions of this Court. The IRS's reversal of course after Congress enacted Bankruptcy Code 1222(a)(2)(A) is an aberration that should not be adopted here.

The Ninth Circuit also erred in holding that administrative expense tax claims may not be treated in a Chapter 12 plan or discharged, and instead concluding that they are left in limbo for effective nondischargeability. This interpretation is inconsistent with express Bankruptcy Code provisions for treatment of administrative expense tax claims under a plan and their discharge.

The requirement that administrative expense claims be paid in full to confirm a plan used to give the IRS veto power over Chapter 12 cases when a family farmer needed to downsize his operations, but a sale would result in substantial tax liability. Congress enacted Section 1222(a)(2)(A) as an ***exception*** to the priority classification scheme, to enable such sales and allow Chapter 12 plans to be confirmed, and to discharge farmers from such tax claims. The capital gains tax from the sale of the Hall Farm meets the criteria for applicability of Section

1222(a)(2)(A), and the judgment of the Ninth Circuit should be reversed.

ARGUMENT

I. Under the Plain Language of the Bankruptcy Code, Section 1222(a)(2)(A) Applies to Taxes Arising from Postpetition Farm Sales.

When interpreting the Bankruptcy Code, if "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). The central provision at issue here requires that a Chapter 12 plan

> provide for the full payment . . . of all claims entitled to priority under section 507, unless . . . the claim is a claim owed to a governmental unit that arises as a result of the sale . . . of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507. . . .

11 U.S.C. § 1222(a)(2)(A).

The statute accordingly strips the priority of claims "owed to a governmental unit" that "arise" from the sale "of any farm asset," and makes them general unsecured claims. The dispute here is whether the

claim at issue is one of the types of "claims" referred to in Section 1222(a)(2)(A).

Section 507 identifies and ranks ten types of expenses and claims, with "administrative expenses" second. *See* 11 U.S.C. § 507(a)(2) (cross-referencing "administrative expenses under section 503(b) of this title"). Section 503(b), in turn, includes as "administrative expenses," "any tax . . . incurred by the estate . . . except a tax of a kind specified in section 507(a)(8) of this title." 11 U.S.C. § 503(b)(1)(B)(i). The tax at issue is not of the kind specified in Section 507(a)(8), because Section 507(a)(8) refers to taxes on sales that occur well before the bankruptcy, and the sale at issue here was postpetition. It accordingly is an "administrative expense" within Section 1222(a)(2)(A)'s reference to claims "entitled to priority under 507." The Section 1222(a)(2)(A) carve-out for "the claim" that "is a claim owed to a governmental unit" refers on its face to being a subset of "all claims entitled to priority under section 507," not just those in Section 507(a)(8).

The Ninth Circuit turned away from this plain language reading. It took a much more winding road in holding that capital gains taxes arising from postpetition sales are not "administrative expenses" within the meaning of Section 1222(a)(2)(A). The plain language reading is better.

A. A Straightforward Reading of the Statute Addresses Taxes from Postpetition Farm Sales.

The Ninth Circuit and the Government have recognized, as they must, that Section 1222(a)(2)(A) has to apply to ***something*** – that is, Congress plainly intended to grant non-priority, unsecured status to some taxes arising from sales of farm assets by Chapter 12 debtors. They say the something to which Section 1222(a)(2)(A) applies is merely taxes of a type specified in Section 507(a)(8).

The most natural reading of Section 1222(a)(2)(A), however, is that Congress meant what it said – that when it referred to "all claims entitled to priority under section 507," Congress meant both of the subsections of Section 507 relating to taxes, not just one of them. *Cf.* Mike Lowry, *A New Paint Job on an '85 Yugo: BAPCPA Improves Chapter 12 but Will It Really Make a Difference?*, 12 DRAKE J. AGRIC. L. 231, 247 (2007) ("Sales after bankruptcy will undoubtedly qualify. . . . "); Katherine M. Porter, *Phantom Farmers: Chapter 12 of the Bankruptcy Code*, 79 AM. BANKR. L.J. 729, 738 (2005) ("Certainly any dispositions made after the bankruptcy filing under the terms of the Chapter 12 plan qualify under Section 1222(a)(2).").

If Congress intended only prepetition taxes to be affected by Section 1222(a)(2)(A), it could have easily referred only to Section 507(a)(8) claims instead of all priority claims. Or it could have used the phrase

"arose before the bankruptcy petition was filed." *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option."). Rather, Section 1222(a)(2)(A)'s plain language clearly creates an exception to the full-payment requirement of all priority claims, and envisions claims for taxes that arise (and thus sales that occur) after the filing of a petition.[1]

B. A Postpetition Tax Is a "Claim" Under the Bankruptcy Code.

Section 1222(a)(2)(A) applies to all "claims" entitled to priority under Section 507. "Claim" is defined extremely broadly in the Bankruptcy Code, and covers any "right to payment," which "'means nothing more nor less than an enforceable obligation.'" *See* 11 U.S.C. § 101(5)(A); *Johnson v. Home State Bank*, 501

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[1] Section 1222(a)(2)(A) could even be read to apply only to postpetition sales. It provides for the contents of a Chapter 12 debtor's "plan" and refers to a tax claim "that *arises* as a result of the sale" of a farm asset used in the "*debtor's* farming operation." The verb "arises" is in the present tense and the statute applies facially to farming by a person "concerning which a case under [Title 11] has been commenced." *See* 11 U.S.C. § 101(13) (definition of "debtor"). *See Carr v. United States*, 130 S. Ct. 2229, 2236 (2010) (applying the Dictionary Act, 1 U.S.C. § 1, and holding that "a statute that regulates a person who 'travels' is not readily understood to encompass a person whose only travel occurred before the statute took effect").

U.S. 78, 83 (1991) (quoting *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)).

Other provisions in the Code make clear that Congress intended administrative expenses set forth in Section 507(a)(2) to be "claims." *See, e.g.*, 11 U.S.C. § 1226(b)(1) ("Before or at the time of each payment to creditors under the plan, there shall be paid . . . any unpaid claim of the kind specified in Section 507(a)(2)."); 11 U.S.C. § 726(b) (referring to "claim" of the kind specified in Section 507(a)(2)); 11 U.S.C. § 1123(a)(1) (Chapter 11 plan shall "designate . . . classes of claims, other than claims of the kind specified in Section 507(a)(2)"); 11 U.S.C. § 1129(a)(9)(A) (repeatedly referring to an administrative expense under 507(a)(2) as a "claim"); 11 U.S.C. § 1326(b)(1) (using the same language as Section 1226(b)(1)). "[T]he basic canon of statutory construction [is] that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992); *see also* I.R.S. Chief Couns. Advice 200518002 (May 6, 2005), 2005 WL 1060956 (stating that when a Chapter 12 debtor does not pay significant postpetition taxes, "the preferred course of action for the Service is to move for dismissal of the case, rather than to file an administrative expense claim").

That administrative expenses fall within the scope of "claims" is also borne out by the Code's definition of "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11

U.S.C. § 101(10)(A). If the word "claim" signifies only prepetition debt as the Ninth Circuit held, then "creditor" would simply be "an entity that has a claim against the debtor." The rest of the statutory definition would be superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting that statutes should not be read to make any provision "superfluous, void, or insignificant"). Congress's reference in Section 1222(a)(2)(A) to "all claims entitled to priority under section 507" thus concisely addresses all taxes to be dealt with in a plan – Section 507(a)(2) administrative expense claims as well as lower priority Section 507(a)(8) claims.

C. A Tax Is "Incurred by the Estate" When It Arises During a Bankruptcy Case.

For a tax to be an administrative expense claim under Section 503(b)(1)(B)(i), it must be "incurred by the estate." The Ninth Circuit held that a Chapter 12 bankruptcy estate cannot incur taxes because IRC 1399 creates a "separate taxable entity" only in individual (*i.e.*, non-corporate) Chapter 7 liquidations and Chapter 11 reorganizations, but not in Chapter 12 and other cases. Pet. App. 6.

This Court interpreted Section 503(b) contrary to the Ninth Circuit's opinion, however, in *United States v. Noland*, 517 U.S. 535, 537, 541-42 (1996). That case did not involve a "separate taxable entity" under IRC 1399, because the debtor was a corporation, not an individual. Yet the Court held that a postpetition

tax penalty was, indeed, an administrative expense claim.

The IRS in *Noland* had filed claims for taxes, interest, and penalties that accrued after a Chapter 11 filing and before conversion to a Chapter 7 liquidation. The parties agreed that the taxes were entitled to priority as "administrative expenses" under Section 503(b), but disagreed about the priority of the penalties. The Court of Appeals found the penalties were entitled to priority under Section 507(a)(1)[2] as "administrative expenses," but found they were subject to "equitable subordination" under another section of the Bankruptcy Code. The issue before the Court was whether equitable subordination could be applied on a categorical basis. In the course of answering that question, the Court first held, unanimously, that the penalties were indeed entitled to "administrative expense" priority under 507. *Id.* at 541, 543.[3] Thus, *Noland* confirms that, even in a case

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[2] At the time, administrative expenses had first priority. They now are second in priority, after certain domestic support obligations.

[3] The Court found it necessary to reach that question for two reasons. First, the Court's ultimate holding was that courts may not make categorical equitable subordination judgments that undermine the policy judgments Congress made in setting priorities in Section 507. Necessary to that analysis was a threshold conclusion that penalties "relating to a tax of a kind specified in subparagraph (B)" (the tax priority at issue in the present case), were in fact entitled to priority as "administrative expenses." *See Noland*, 517 U.S. at 541 ("The Court of Appeals' decision thus runs directly contrary to Congress's policy

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where there is no "separate taxable entity," taxes arising postpetition are "administrative expense claims" under Section 503(b).

Similarly, the Court interpreted Chapter XI of the predecessor Bankruptcy Act in a corporate case with no separate entity taxpayer to mean that "taxes incurred during the arrangement period are expenses of the Chapter XI proceedings and are therefore technically a part of the first priority under § 64a(1)." *Nicholas v. United States*, 384 U.S. 678, 687-88 (1966). The "arrangement period" under Chapter XI is the equivalent of the postpetition/pre-confirmation period under the current Bankruptcy Code. *See also* S. Rep. No. 95-989 at 66 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5852 (stating that 503(b) "is derived mainly from section 64a(1) of the Bankruptcy Act").

The Courts of Appeals have long been in accord. As the Fourth Circuit has explained, taxes "incurred by the estate" means postpetition taxes, "since by definition there can be no bankruptcy estate until the petition in bankruptcy is filed." *See United States v. Friendship College, Inc.*, 737 F.2d 430, 431 (4th Cir.

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judgment that a postpetition tax penalty should receive the priority of an administrative expense"). Second, the debtor in *Noland* argued that the penalties should be treated as lower-priority prepetition expenses. *Id.* at 541 n.3. The Court rejected the argument, holding that Section 503(b) is clear. *Id.* ("We agree with the Sixth Circuit . . . that the penalties at issue here are postpetition administrative expenses").

1984); *see also In re Sunnyside Coal Co.*, 146 F.3d 1273, 1278 (10th Cir. 1998); *Towers for Pacific-Atlantic Trading Co. v. United States (In re Pacific-Atlantic Trading Co.)*, 64 F.3d 1292, 1294 (9th Cir. 1995); *Mo. Dep't of Revenue v. L.J. O'Neill Shoe Co. (In re L.J. O'Neill Shoe Co.)*, 64 F.3d 1146, 1148 (8th Cir. 1995); *W. Va. State Dep't of Tax & Revenue v. IRS (In re Columbia Gas Transmission Corp.)*, 37 F.3d 982, 984 (3d Cir. 1994); *United States v. Ledlin (In re Mark Anthony Constr., Inc.)*, 886 F.2d 1101, 1101 (9th Cir. 1989).

Two such cases specifically involve capital gains taxes arising from postpetition asset sales where there were no separate taxable entities under the IRC. *See In re I.J. Knight Realty Corp.*, 501 F.2d 62, 66 (3d Cir. 1974) (holding in Chapter XI case under the Bankruptcy Act that the bankruptcy trustee of an entity debtor must use estate assets to pay capital gains tax on sale of estate assets); *United States v. Sampsell*, 266 F.2d 631, 634-35 (9th Cir. 1959) (holding in corporate bankruptcy that liquidating trustee must use estate assets to pay capital gains tax); *see also* 8 William L. Norton, Jr., NORTON BANKRUPTCY LAW & PRACTICE § 155:12, at 155-25 (3d ed. 2010) ("Any tax liability that is create [sic] by the estate on the disposition of property or on the transfer of property in settlement of the debt is an administrative expense of the estate under Code § 503(b)(1)(B)(i). The tax obligation is not a debt of the debtor but of the estate.").

Postpetition tax claims thus have a venerable history of administrative expense status, both under the Bankruptcy Act of 1898 and the current Bankruptcy Code, without regard to whether a separate taxable entity exists. In the absence of clear legislative intent to alter well-recognized interpretations of bankruptcy law, subsequent enactments do not change existing law. *See Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) ("[T]his Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The Court has followed this rule with particular care in construing the scope of bankruptcy codifications."); *Ron Pair Enters.*, 489 U.S. at 244 (holding that deviations from pre-Code practice require clear expression of Congressional intent).

The legislative history to the Bankruptcy Code confirms there was no intent to alter the longstanding rule that "[t]axes arising from the operation of the estate after bankruptcy are entitled to priority as administrative expenses." *See* H.R. Rep. No. 95-595, at 193 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6153 (stating that this was existing law, and that the Bankruptcy Code codified this rule, citing *Security-First Nat'l Bank v. United States (In re F.P. Newport Corp.)*, 153 F.2d 563 (9th Cir. 1946), which held that a tax imposed on income derived

from the lease of estate assets is an administrative expense); S. Rep. No. 95-989, at 66 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5852 ("[A]dministrative expenses include taxes which the trustee incurs in administering the debtor's estate, *including taxes on capital gains from sales of property by the trustee* and taxes on income earned by the estate during the case." (emphasis added)).

Indeed, the legislative history of the specific words on which the Ninth Circuit and the Government heavily rely – "incurred by the estate" – is described at length in *Pacific-Atlantic*, 64 F.3d at 1299-1300. It shows that Congress focused on when the tax became due – prepetition or postpetition – rather than the taxable entity status of the debtor. Congress intended for a tax on income to be considered "incurred" on the last day of the income period, by the debtor-bankruptcy estate, which in 1978 was a single taxable entity in all cases, with the postpetition portion payable as an administrative expense claim and the prepetition portion as a priority claim from bankruptcy estate assets. *Id.*

The Government's argument also is inconsistent with the IRC itself. The phrase "incurred by the estate" appears in IRC 6658, entitled "Coordination with Title 11," which concerns a taxpayer's obligation while in, or just before, bankruptcy. It provides that penalties and interest do not accumulate for failure to make a timely tax payment "with respect to a period during which a case is pending under title 11 of the United States Code . . . if such tax was incurred by

the estate and the failure occurred pursuant to an order of the court finding probable insufficiency of funds of the estate to pay administrative expenses," or if the tax was incurred prepetition but with a tax return due postpetition, *i.e.*, a straddle year tax. 26 U.S.C. § 6658.

Congress used the words "incurred by the estate" in IRC 6658 to refer to the postpetition incurrence of taxes, just as it used them in Bankruptcy Code 503(b)(1)(B)(i) for the same purpose. The Senate Report for IRC 6658 confirms the point:

> In the case of a tax incurred by the estate, the relief [from penalties and interest] is granted if the failure occurs pursuant to a court order finding probable insufficiency of funds to pay such taxes. In the case of a tax incurred by the debtor before commencement of the bankruptcy case, the relief provision of the bill applies if either the bankruptcy petition is filed before the tax return due date, or the date for imposing the penalty occurs after commencement of the bankruptcy case.

S. Rep. No. 96-1035, at 51 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 7017, 7064. Thus, Congress viewed a tax "incurred by the estate" as not incurred "before commencement of the bankruptcy case," *i.e.*, postpetition. Notably, IRC 6658 was enacted as part of the same Bankruptcy Tax Act that created a separate taxable estate for individual Chapter 7 and 11 debtors. It shows that in 1980, even as it enacted provisions for

separate taxable estates in certain types of cases, Congress meant "incurred by the estate" to turn on whether the tax was incurred after commencement of the bankruptcy case with administrative expense claim treatment. There is no reason to read the same words in Bankruptcy Code 503(b)(1)(B)(i) differently. Congress intended taxes incurred postpetition to be administrative expenses, and Section 1222(a)(2)(A) therefore applies.

The Ninth Circuit effectively rewrote Bankruptcy Code 503(b)(1)(B) by replacing the bankruptcy term "estate" with the IRC term "taxable entity," despite the fact that they are not the same thing. *See Abbott v. Abbott*, 130 S. Ct. 1983, 2003 (2010) ("In interpreting statutory text, we ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning.").

II. The Legislative History of Section 1222(a)(2)(A) Confirms Congressional Intent to Apply to Postpetition Farm Sales.

A. The Principal Sponsor of the Provision Explained its Purpose.

Before the 2005 amendment to Section 1222(a)(2)(A), the Bankruptcy Code required full payment of all priority claims under Section 507, unless the holder of the claim agreed that its claim could be treated differently. 11 U.S.C. §§ 1222(a)(2), 1225(a)(1) (2004). The IRS could object to any plan that did not provide for full payment of its tax claim, and effectively veto

it. *See* 14A Arthur Boelter, MERTEN'S LAW OF FEDERAL INCOME TAXATION § 54.61 (updated 2010) ("Before enactment of the provision in 2005, these dispositions created large priority tax claims that barred confirmation of Chapter 12 plans."); 7 William L. Norton, Jr., NORTON BANKRUPTCY LAW & PRACTICE § 122:10, at 122-19 (3d ed. 2010) (noting that the change to Section 1222(a)(2)(A) effected a "paradigm shift" because before the change "debtors would seek to sell their low tax basis assets to reduce their indebtedness to levels where they could operate profitably but could not confirm their Chapter 12 plans due to the significant income taxes that were occasioned by the sale for capital gains and depreciation recapture"). Family farms are often owned by family members for many years, resulting in the assets having a low tax basis, and significant capital gains taxes when sold. *See* Boelter, *supra*, § 54.61; 7 Norton, *supra*, § 122:10 at 122-19. The entire purpose of Section 1222(a)(2)(A) was to permit family farmers in Chapter 12 cases to liquidate portions of their farms and increase profitability without worrying about the tax consequences of the sale. *See* 7 William L. Norton, Jr., NORTON BANKRUPTCY LAW & PRACTICE § 1333:6 at 133-10 (3d ed. 2010).

This purpose is shown by the repeated floor statements of Senator Grassley, one of the sponsors of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1103, 119 Stat. 23, 190 (2005) ("BAPCPA"), who was largely responsible for the inclusion of Section 1222(a)(2)(A) in the Bankruptcy Code. In January of 1999, Senator

Grassley introduced a bill called "Safeguarding America's Farms Entering the Year 2000 Act," known as "Safety 2000." It contained language identical to the language that was enacted in BAPCPA. S. 260, 106th Cong. § 3 (1999). In his statements to Congress on Safety 2000, Senator Grassley stated that the bill was intended to

> help[ ] farmers to reorganize by keeping tax collectors at bay. Under current law, farmers often face a crushing tax liability if they need to sell livestock or land in order to reorganize their business affairs. . . . [H]igh taxes have caused farmers to lose their farms. Under the bankruptcy code, the I.R.S. must be paid in full for any tax liabilities *generated during a bankruptcy reorganization*. If the farmer can't pay the I.R.S. in full, then he can't keep his farm. This isn't sound policy. Why should the I.R.S. be allowed to veto a farmer's reorganization plan? "Safety 2000" takes this power away from the I.R.S. by reducing the priority of *taxes during proceedings*. This will free up capital for investment in the farm, and help farmers stay in the business of farming.

See 145 Cong. Rec. S727, S764 (1999) (statement of Sen. Charles Grassley) (emphasis added).

Safety 2000 was never enacted, but Senator Grassley persisted in trying to provide capital gains tax relief in Chapter 12 cases. In March of 1999, he introduced the Bankruptcy Reform Act of 1999 (the "1999 Reform Act"), which included language identical

to current Section 1222(a)(2)(A). *See* 145 Cong. Rec. S2695, S2738, S2764 (1999); S. 625, 106th Cong. § 1004 (1999). The Senate passed the 1999 Reform Act, and it was sent to a conference committee. *See* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 531 (2005). After changes in the conference committee (none of which affected Section 1222(a)(2)(A)), Senator Grassley reintroduced the legislation as the Bankruptcy Reform Act of 2000 in S. 3186, and the conference committee filed the same language as the H.R. 2415 conference report. *See* S. 3186, 106th Cong. (2000); H.R. Rep. No. 106-970 (2000) (Conf. Rep.); Jensen, *supra*, at 536. Congress passed the Bankruptcy Reform Act of 2000, but President Clinton pocket vetoed it. *See* 146 Cong. Rec. H9817, H9840 (2000) (house vote); 146 Cong. Rec. S11663, S11730 (2000) (senate vote); Jensen, *supra*, at 539.

In three floor statements to the Senate, Senator Grassley said that the parts of the 1999 Reform Act that amended Chapter 12 were intended to make Chapter 12

> more accessible and helpful for farmers. . . . [The Reform Act would] reduce[ ] the priority of capital gains tax liabilities for *farm assets sold as part of a reorganization plan*. This will have the beneficial effect of allowing cash-strapped farmers to sell livestock, grain, and other farm assets to generate cash flow when liquidity is essential to maintaining a family farm operation.

See 145 Cong. Rec. S11075, S11093 (1999); 145 Cong. Rec. S14051, S14055 (1999); 146 Cong. Rec. S6185, S6249 (2000) (emphasis added). Senator Grassley also introduced a letter signed by five senators saying the same thing. *See* 145 Cong. Rec. S11075, S11093 (1999).

In 2001, Senator Grassley introduced the Bankruptcy Reform Act of 2001, which again included language identical to current Section 1222(a)(2)(A). *See* S. 220, 107th Cong. § 1003 (2001); S. 420, 107th Cong. § 1003 (2001); *Jensen*, *supra*, at 543. He introduced a written statement in a Senate hearing that this language was intended to reduce the priority of taxes resulting from farm assets "sold as part of a reorganization plan." *See The Bankruptcy Reform Act of 2001: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 121 (2001) (statement of Sen. Grassley), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-107shrg76343/pdf/CHRG-107shrg76343.pdf. The Senate passed the Bankruptcy Reform Act, but it died on a technicality. *See Jensen*, *supra*, at 545; 147 Cong. Rec. S2323, S2379 (2001).

Senator Grassley's statements show that Section 1222(a)(2)(A) was intended to cover postpetition taxes "generated during a bankruptcy reorganization" or "sold as part of a reorganization plan." Significantly, there is no legislative history indicating that Section 1222(a)(2)(A) was intended to apply only to prepetition sales.

This Court has been reluctant to consult legislative history relating to unenacted legislation and to impute an earlier Congress's intent to a subsequent Congress. But much of the long history that led to the enactment of BAPCPA was incorporated into the legislative history for BAPCPA itself. *See* H.R. Rep. No. 109-31, at 6-8 & n.34 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 92-95. The Court recently recognized that the House Report on BAPCPA cited several hearings from previous Congresses, thus making the hearings part of the record of BAPCPA. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1332 n.3 (2010).[4] The House Report also notes that Congress passed Senator Grassley's Bankruptcy Reform Act of 2000, and that the Senate passed Senator Grassley's Bankruptcy Reform Act of 2001. *See* H.R. Rep. No. 109-31, at 6 & nn.25 & 32.

The relevant language of all these predecessor bills is identical to that enacted in BAPCPA, Senator Grassley was a sponsor of all of them, and Congress actually approved that language when it passed the Bankruptcy Reform Act of 2000. Under similar circumstances, this Court has considered statements made in hearings from which the statutory provision under consideration "emerged." *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 207-08 (1983) (consulting legislative history relating to Bankruptcy

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[4] The Senate hearing in which Senator Grassley introduced his written statement is not expressly cited in the House Report, but that hearing is part of the background of BAPCPA.

Code 542(a) located in records of hearings from prior Congresses where "[t]he section remained unchanged through subsequent versions of the legislation"); *United States v. Plesha*, 352 U.S. 202, 205-08 (1957) (looking to legislative history of similar previous legislation); *see also United States v. O'Neil*, 11 F.3d 292, 300-01 (1st Cir. 1993) (noting that courts, including this Court have looked to legislative history of bills considered in different Congresses as providing "some probative value," especially when sponsoring legislators are the same).

The legislative history confirms the statutory plain language of Section 1222(a)(2)(A).

B. The 2005 Amendment to Section 507(a)(8) Shows That Section 1222(a)(2)(A) Must Apply to Administrative Expense Tax Claims.

As noted, Bankruptcy Code Section 507 contains two subsections dealing with taxes. Section 507(a)(2) gives second-level priority to taxes "incurred by the estate" by cross-reference to Section 503(b). 11 U.S.C. § 503(b)(1)(B)(i). Section 507(a)(8) gives eighth-level priority to certain taxes that arose before the petition. By holding that taxes in Section 507(a)(2) are not covered by Section 1222(a)(2)(A), the Ninth Circuit necessarily held that the ***only*** type of taxes to which Congress intended to extend Section 1222(a)(2)(A)'s special protection are those prepetition taxes described in Section 507(a)(8). In so holding, the Ninth Circuit has ascribed an unlikely intent to Congress,

and one that would make little sense, especially given a BAPCPA amendment to Section 507(a)(8).

Before 2005, the coverage of Section 507(a)(8) was disputed. The IRS contended that all tax liability for the tax year in which a bankruptcy petition is filed should be treated as incurred postpetition at the end of the debtor's tax year and thus have higher priority, unless the debtor was permitted to, and did, split the tax year under IRC 1398. The IRS interpreted Section 507(a)(8)(A)(iii) to mean that all taxes incurred in the tax year in which a bankruptcy petition is filed – those resulting from income earned both pre- and postpetition that year – were outside Section 507(a)(8) and thus should be given the higher administrative expense priority. If a calendar year taxpayer filed a bankruptcy petition on September 1, 2003, the IRS would say that all taxes incurred that calendar year (including January 1 through August 31, 2003) were outside Section 507(a)(8) and thus had to be treated as postpetition and assigned "administrative expense" priority under Section 507(a)(2). *See United States v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.)*, 116 F.3d 1391, 1394 (11th Cir. 1997); *Pacific-Atlantic*, 64 F.3d at 1298; I.R.S. Chief Couns. Advice 200235024 (Aug. 30, 2002), 2002 WL 1999525; I.R.S. Litigation Bulletin 448 (Jan. 1998).

Courts often disagreed with this interpretation, concluding that taxes for the "straddle year" were split into a prepetition portion and a postpetition portion. *See Hillsborough Holdings*, 116 F.3d at 1394-96; *Pacific-Atlantic*, 64 F.3d at 1302; *O'Neill Shoe*, 64

F.3d at 1150-51. These courts held that the prepetition portion of the taxes did not qualify as administrative expenses because Section 503(a)(2) expressly excludes taxes "of a kind specified in Section 507(a)(8)."

Congress legislatively overruled these cases and essentially adopted the IRS's view in 2005 when it amended Section 507(a)(8). As amended, it provides eighth-level priority to:

> [A]llowed unsecured claims of governmental units, only to the extent that such claims are for –
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> > (A) a tax on or measured by income or gross profits *for a taxable year ending on or before the date of the filing of the petition* –
> >
> > . . .
> >
> > > (iii) other than a tax of a kind specified in Section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case[.]

BAPCPA, *supra*, § 705, 119 Stat. 23, 126; 11 U.S.C. § 507(a)(8) (new language emphasized).

As a result, Section 507(a)(8) now applies only to taxes that are incurred in the tax year before the year in which a bankruptcy petition is filed, and those incurred in the straddle year of the petition filing are treated entirely as administrative expenses. *See*

In re FR & S Corp., No. 08-08659 ESL, 2011 WL 1261329 (Bankr. D.P.R. Mar. 30, 2011); 15 COLLIER ON BANKRUPTCY ¶ TX4.03 (15th ed. rev. 2010) (stating that after the amendment, "income and gross receipt taxes for the year of the bankruptcy filing are post-petition administrative expense claims that must be paid in full in the ordinary course, rather than pre-petition priority claims that are not payable until emergence from bankruptcy"); Gregory L. Germain, *Income Tax Claims in the Year of Bankruptcy: A Congressionally Created Quagmire*, 59 TAX LAW. 329, 376-78 (2006). As the IRS explains in its Manual:

> (1) Because Chapter 11 debtors ordinarily continue to operate their businesses after filing for bankruptcy and seldom file bankruptcy on the first day of a new tax reporting period, there are frequently federal tax liabilities owed by Chapter 11 debtors for taxes arising in the year in which the bankruptcy petition was filed.
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> . . . .
>
> (b.) However, income taxes are incurred on the last day of the income tax year. 11 USC § 507(a)(8)(A), as amended by BAPCPA, clarifies that only income taxes for tax years ending on or before the petition date will receive priority treatment in the bankruptcy case. Thus, income taxes that accrue in the year for which the bankruptcy petition is filed are entirely administrative expense taxes.

> **Note:** Section 507(a)(8)(A) was clarified by BAPCPA to provide that income taxes will be considered prepetition (priority) claims only when the tax year ended before the bankruptcy petition was filed, overturning pre-BAPCPA case law that relied on that section to hold that the petition-year liability should be split into prepetition and postpetition portions. See In re Pacific-Atlantic Trading Co., 64 F.3d 1292 (9th Cir. 1995).

Internal Revenue Manual § 5.17.10.6.2 (2011).

The Ninth Circuit's holding that the only taxes covered by Section 1222(a)(2)(A) are those described in Section 507(a)(8) thus means that family farmers are entitled to Section 1222(a)(2)(A)'s special protections only if they sell their farms well before filing a bankruptcy petition – by as much as a year. Family farmers in dire financial straits in February would have to sell the farm (likely at an urgent "fire sale") and then wait until the following January to file a Chapter 12 petition in order to take advantage of Section 1222(a)(2)(A). If, like the Halls, they faced a foreclosure sale that would prevent their farm equity from being used to pay other creditors, they could not file for Chapter 12 relief and downsize their farm assets at a market value sale under the supervision of the Bankruptcy Court without losing the benefit of Section 1222(a)(2)(A).

The Ninth Circuit's analysis strains credulity – it means that Congress went to the trouble of enacting

Section 1222(a)(2)(A) merely to protect those family farmers with the foresight or ability to sell their farms well in advance of filing a Chapter 12 petition. And not only does it mean that Congress exempted the vast majority of tax claims from Section 1222(a)(2)(A)'s coverage (*i.e.*, those identified in Section 507(a)(2)), but that it did so by assuming that words tucked away in a provision of an entirely separate Code with an entirely separate purpose would do that work. The more natural interpretation is that all "claims entitled to priority under section 507" are covered by Section 1222(a)(2)(A), which also has the benefit of having the more natural and commonsensical consequence. It means Section 1222(a)(2)(A) applies to taxes arising from farm asset sales in the bankruptcy petition filing year and through the administration of the case, when most sales to restructure farm debt are likely to occur. *Cf.* 11 U.S.C. § 503(b)(9) (similarly treating certain prepetition reclamation claims as administrative priority claims).

III. Postpetition Taxes Have Administrative Expense Priority Without Regard to Taxable Entity Status Because Priority of Payment is a Bankruptcy Law Concept that Does Not Depend on What the IRC Says.

The Ninth Circuit said that a tax claim due to a postpetition sale of bankruptcy estate assets is not a Section 503(b)(1)(B)(i) "tax . . . incurred by the estate" because a Chapter 12 bankruptcy estate is not a separate taxable entity under the IRC, unlike the

estates of individual Chapter 7 and 11 debtors. 26 U.S.C. §§ 1398, 1399; Pet. App. 6-7. This holding reflects a fundamental misunderstanding of the nature of the bankruptcy "estate" and liabilities for estate transactions. A bankruptcy filing creates an estate consisting of property. Sales of estate property are taxable, and the resulting tax claims are payable from estate property. The Bankruptcy Code, not the IRC, controls rights and obligations to distribute bankruptcy estate funds to pay taxes and other claims. IRC provisions making the debtor and estate a single taxable entity or separate taxable entities do not alter these rights and obligations or disrupt the priorities set forth in the Bankruptcy Code. The person in control of the bankruptcy estate is responsible to pay the taxes, but using bankruptcy estate money. The Government was in accord on this until Section 1222(a)(2)(A) created an exception to the administrative expense priority such tax claims would otherwise enjoy. If the Government's about-face were to be adopted by this Court, it would upend fundamental bankruptcy principles and practice.

A. The Bankruptcy "Estate" Consists of Property Liquidated for Creditors that Can Generate Taxable Income.

A bankruptcy "estate" consists of property that is liquidated for the purpose of paying creditors, and is the *res* of *in rem* bankruptcy jurisdiction. *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447-48 (2004); *Gardner v. New Jersey*, 329 U.S. 565, 574

(1947). The estate is formed upon the entry of the order for relief and consists of virtually all of the debtor's assets. *See* 11 U.S.C. § 541. Farm assets are property of the farmer-debtor's estate in a Chapter 12 bankruptcy case, as are proceeds from the sale of those assets. *See* 11 U.S.C. §§ 541(a)(6), 1207(a). Indeed, all property acquired by the farmer-debtor postpetition is property of the estate, including earnings from services. *See* 11 U.S.C. § 1207(a).

Income that is earned by the estate through the sale of assets or ordinary business operations is taxable. *See Nicholas*, 384 U.S. at 686; *Phila. Co. v. Dipple*, 312 U.S. 168, 175 (1941) (recognizing that a bankruptcy trustee had to pay taxes incurred in the course of operating the debtor's business under predecessor to 28 U.S.C. § 960); *Boteler v. Ingels*, 308 U.S. 57, 61 (1939) (holding that bankruptcy trustee was subject to tax penalty for failure to pay licensing taxes while operating the debtor's business); *see also Holywell Corp. v. Smith*, 503 U.S. 47, 53-56 (1992) (holding that the bankruptcy estates of individual Chapter 11 and corporate Chapter 11 debtors include proceeds of postpetition sales of property, which are taxable, with estate assets and tax payment responsibility assigned to corporate plan trustee and fiduciary of individual plan trust).

B. Bankruptcy Estate Transactions Are Taxable Whether the Debtor and Estate Are a Single Taxable Entity or Separate Taxable Entities.

1. The Bankruptcy Tax Act of 1980 Made Certain Bankruptcy Estates into Separate Taxable Entities.

When the Bankruptcy Code was enacted, Congress did not make bankruptcy estates into "separate" taxable entities. The debtor was taxed as a continuous entity, and the Bankruptcy Code determined the status of the tax as an administrative expense, or a claim entitled to lower priority. The determination turned solely on whether the taxes were incurred before or after the petition was filed. *See Pacific-Atlantic*, 64 F.3d at 1299-1300.

In 1980, Congress enacted the Bankruptcy Tax Act, requiring that the bankruptcy estate of an individual debtor in a Chapter 7 or 11 case be taxed as a separate taxable entity, with no separate taxable entity status for all other bankruptcy cases. Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 3, 94 Stat. 3389, 3397-3401 (1980); 26 U.S.C. §§ 1398, 1399. At that time, postpetition earnings of individual debtors in Chapter 7 and 11 cases, and most property acquired by those individual debtors after they filed their bankruptcy petitions, was not included in the

property of the estate.[5] *See* 11 U.S.C. § 541(a)(1), (6); S. Rep. No. 96-1035, at 24 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 7017, 7038-39. ("[W]ages earned by the individual after commencement of the case and after-acquired property do not become part of the bankruptcy estate, but belong to the individual. . . ."). Non-exempt assets belonging to the debtor as of the petition date were administered as the *res* of the bankruptcy estate, and paid to creditors by a Chapter 7 trustee or under a plan of reorganization. Exempt assets, postpetition income, and subsequently-acquired assets belonged to the debtor individually as part of his "fresh start," so the debtor, rather than the estate, paid the taxes on that income. This was the primary reason for the creation of a "separate taxable entity" in Sections 1398 and 1399. *See* S. Rep.

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[5] Congress determined in 2005 to include postpetition earnings and assets of individual Chapter 11 debtors in the bankruptcy estate. *See* BAPCPA, *supra*, § 321(a), 119 Stat. 23, 94. At that point, the reason for treatment as a separate taxable entity ended in those cases too. Commentators have noted the havoc that this apparent oversight has created. *See, e.g.*, Wm. Robert Pope, Jr. & Francis D. Sheehy, *Federal Income Taxation of the Individual Debtor and the Bankruptcy Estate: Double Taxation-Really?*, NORTON BANKR. L. ADVISER, May 2011, at 1 (noting that "Congress added § 1115 to the Bankruptcy Code and created a tax problem under I.R.C. § 1398" that could only be resolved by "removing the individual Chapter 11 from § 1398"); Jack F. Williams & Jacob L. Todres, *Tax Consequences of Post-Petition Income as Property of the Estate in an Individual Debtor Chapter 11 Case and Tax Disclosure in Chapter 11*, 13 AM. BANKR. INST. L. REV. 701, 717 (2005) ("[T]he conflict now posed by Section 1398 and the new provision codified at Bankruptcy Code Section 1115 is inescapable.").

No. 96-1035, at 24, 25 & n.2 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 7017, 7038, 7040.[6]

Consistent with this scheme and the policy underlying it, Congress also concluded that "an individual debtor in a bankruptcy case generally should be given an election to close his or her taxable year at the date of bankruptcy." *Id.* at 26; *see also* 26 U.S.C. § 1398(d)(2)(A) (permitting individual Chapter 7 or 11 debtor to divide a taxable year into prepetition and postpetition portions). If such an election is made, the

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[6] The Tenth Circuit recently stated in *In re Dawes* that Congress enacted Sections 1398 and 1399 for a "pragmatic" purpose. ___ F.3d ___, ___, No. 09-3129, 2011 WL 2450930, at *3 (10th Cir. June 21, 2011). The court said that in Chapter 12 and 13 cases, "[d]isregarding the temporary existence of a bankruptcy estate for purposes of tax liability tidies the accounting somewhat, because there's only a single return – the debtor's – that needs to be filed and kept track of." *Id.* at *3. *Dawes* cites no authority for either of these propositions, and none exists. As noted, the legislative history of the separate taxable entity statutes shows the rationale is the cleavage between prepetition property and postpetition property in individual Chapter 7 and (when the statute was enacted) 11 cases. *Dawes* also says that Congress must have intended to tax debtors individually instead of bankruptcy estates in Chapter 12 and Chapter 13 cases because their plans are confirmed faster than Chapter 11 plans, so the expectation is that the "debtor's post-petition earnings and taxes will meet up in his hands soon enough." *Id.* But the length of the period from petition filing to plan confirmation does not alter the taxability of sales of estate assets during that period. And the Chapter 12 debtor's obligation to file tax returns (like corporate Chapter 11 debtors) does not alter the right and obligation to use the proceeds of estate asset sales to pay taxes and other liabilities on account of the sales.

debtor's income tax liability for the prepetition 'short' taxable year becomes collectible out of the bankruptcy estate, to the extent the estate has assets to pay debts of that priority. As to postpetition income, IRC 1398(e) provides that "[t]he gross income of the estate for each taxable year shall include the gross income of the debtor *to which the estate is entitled under Title 11 of the United States Code.*" 26 U.S.C. § 1398(e) (emphasis added). In cases in which IRC 1398 applies, and in which the debtor elects to split the tax year, "the taxes owed for the prepetition partial 'year' are treated as Section 507(a)(8) prepetition priority taxes, and taxes owed for the post-petition partial 'year' are treated as Section 507(a)(1) administrative expenses, if the benefit of the income redounded to the estate, or as personal obligations of the debtor, if the benefit redounded to the debtor as part of the debtor's fresh start." *See* Gregory L. Germain, *Income Tax Claims in the Year of Bankruptcy: A Congressionally Created Quagmire*, 59 TAX LAW. 329, 356-57 (2006).

In contrast, the postpetition income, profits and assets of a Chapter 13 debtor have always been property of the bankruptcy estate. *See* 11 U.S.C. § 1306(a). Accordingly, like an entity Chapter 11 debtor, taxable-year election rights were not extended to Chapter 13 debtors. *See* S. Rep. No. 96-1035, at 24-26 & n.2. The same estate property concept was used in Chapter 12 cases when Chapter 12 was enacted in 1986. *See* 11 U.S.C. §§ 541(a)(6), (7), and 1207(a). Chapter 12 cases are accordingly within IRC 1399, along with the other kinds of bankruptcy cases that have estates

generating income from actions of the debtor during the bankruptcy case. Because there is no distinction between the debtor's income and the estate's income, income of the debtor and the estate is taxed collectively before plan confirmation. The debtor and the bankruptcy estate are a single taxpayer entity that is responsible for filing returns for all taxes incurred during estate administration. *See* William Tatlock, *Discharge of Indebtedness, Bankruptcy and Insolvency*, TAX MANAGEMENT A-59 (2009).

Nowhere in the course of enacting the Bankruptcy Tax Act did Congress even hint that it was changing the existing treatment of postpetition taxes on income earned with estate assets as administrative expenses. IRC 1398 and 1399 do not mention priority payment status from estate assets. That stands to reason, because the rationale for individual Chapter 7 and 11 debtors' separate taxation has nothing to do with whether a tax that arises from an estate asset sale is payable from estate assets as an administrative expense. *See also* discussion of 26 U.S.C. § 6658 in section I.C., *supra*.

2. Taxation of Income After Plan Confirmation Is Unclear, but Irrelevant to This Case.

The Bankruptcy Code is inconsistent in providing, on one hand, that individual earnings and assets acquired after the petition date and before a case is closed, dismissed, or converted to a Chapter 7

liquidation are included in the estate of an individual reorganizing debtor. 11 U.S.C. §§ 1207(a), 1306, 1115 (as amended in BAPCPA in 2005). On the other hand, it also provides that when a plan is confirmed, property of the estate vests back in the debtor unless otherwise provided in the plan. 11 U.S.C. §§ 1141(b), 1227(b), 1327(b). Given the multi-year nature of an individual's plan, courts have analyzed the postconfirmation status of debtor earnings and income tax liability in various ways, with the majority concluding that only property necessary to plan implementation is property of the estate after plan confirmation and protected by the automatic stay, and the remainder vests back in the debtor. *See Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1340 (11th Cir. 2000); *In re Heath*, 115 F.3d 521, 524 (7th Cir. 1997); *see also Sec. Bank of Marshalltown, Iowa v. Neiman*, 1 F.3d 687, 691 (8th Cir. 1993).

The case before the Court does not concern postpetition earnings that arguably vested back in the individual debtor upon plan confirmation. It concerns taxes incurred on account of the disposition before plan confirmation of real property that was clearly part of the bankruptcy estate, and the capital gains income tax that arose preconfirmation on account of that transaction. The Halls' bankruptcy estate received the proceeds from the Hall Farm sale, not the Halls individually, and payment of any taxes from those proceeds is consistent with the general principle that income taxes are imposed only on the one that actually earns the income. *See United States v.*

Bayse, 410 U.S. 441, 447 (1973) ("[I]ncome is taxed to the party who earns it."); *Comm'r v. Culbertson*, 337 U.S. 733, 739-40 (1949) (holding that "the first principle of income taxation" is that "income must be taxed to him who earns it").

C. Administrative Expense Tax Claims Are Payable from Estate Assets, Unless the Code Expressly Provides Otherwise.

1. Bankruptcy Code Priority Payment Provisions Apply Uniformly, Without Distinguishing Between Single Taxable Entity and Separate Taxable Entity Debtors.

The IRC provides for the assessment of taxes, while Bankruptcy Code Sections 503 and 507 determine the priority treatment of taxes and other claims in bankruptcy cases from bankruptcy estate assets. "Priority is a bankruptcy term of art; its meaning cannot be gleaned from any other source of law." C. Richard McQueen & Jack F. Williams, TAX ASPECTS OF BANKRUPTCY LAW AND PRACTICE § 14.9 (3d ed. updated 2011). As explained by the Eighth Circuit in a case concerning state income taxes where the debtor was a corporate entity, and thus taxed under IRC 1399, the government taxes the debtor as it would outside of bankruptcy as a continuous single entity. *O'Neill Shoe*, 64 F.3d at 1152. The amount of the tax is a claim against the bankruptcy estate, and the priority of claim treatment is determined by the Bankruptcy Code. *Id.*; *see also Hillsborough Holdings*, 116 F.3d at

1396 ("In keeping with the IRC, the taxes will be imposed as if no bankruptcy petition had ever been filed. The payment of the taxes, however, will be governed by the principles and priorities of the bankruptcy laws.").

The priority provisions of Bankruptcy Code 503 and 507 apply in all bankruptcy cases under all Chapters, and to individual and entity debtors. 11 U.S.C. § 103(a). This reflects the fundamental principle that bankruptcy estate assets must be used to pay taxes and other liabilities incurred on account of bankruptcy estate transactions. *Swarts v. Hammer*, 194 U.S. 441, 444 (1904) (bankruptcy estate funds must be used to pay state and municipal taxes; any exception from such liability must be clearly expressed); *Reading Co. v. Brown*, 391 U.S. 471, 483-84 (1968) (tort claims and other costs ordinarily incident to operation of a business during bankruptcy administration, along with state and federal taxes, are actual and necessary costs of a Chapter XI arrangement and payable as administrative expenses). The Ninth Circuit's opinion is wrong because it "fails to appreciate that new § 1222(a)(2)(A) is a bankruptcy priority provision that regulates the priority and dischargeability of certain claims of any governmental unit and is not simply a federal income tax provision embedded in the Bankruptcy Code." *See* McQueen & Williams, *supra*, § 14.9.

2. Chapter 13 Includes a Unique Mechanism for Addressing Postpetition Taxes.

The Ninth Circuit reasoned in part that Chapter 12 cases are like Chapter 13 cases. Pet. App. 6. Unlike Chapter 11 and 12 cases, in Chapter 13 bankruptcies the IRS has an express option to file a proof of claim for postpetition taxes, but is not required to. *See* 11 U.S.C. §§ 1305(a)(1), 503(b)(1)(D). If the IRS files a proof of claim, the debtor may include the postpetition tax claim in the Chapter 13 plan, but it will be treated as a prepetition claim. *See* 11 U.S.C. § 1305(b). If the IRS declines to file a proof of claim, the postpetition tax claim is no longer treated in the bankruptcy case, and becomes a personal liability of the debtor. Section 1305(a) does not alter the taxable nature of transactions during a Chapter 13 case, but provides a unique option for treating such claims under the plan. *In re Joye*, 578 F.3d 1070, 1076-77 (9th Cir. 2009); *In re Fowler*, 394 F.3d 1208, 1214 (9th Cir. 2005).

Chapter 12 has no provision like Section 1305(a) for individual, corporate or partnership Chapter 12 debtors. *See* 11 U.S.C. § 101(19) ("family farmer" may be individual, corporation or partnership). In that and other respects, Chapter 12 cases are more like Chapter 11 cases than Chapter 13 cases. *See In re Seger*, 444 B.R. 492, 493 (Bankr. D. Mass. 2011); Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, § 57.1, at ¶¶ 7-8 (4th ed.), Sec. Rev. Apr. 30, 2004, www.Ch13online.com (footnotes omitted).

Chapter 12 debtors may sell estate assets with court approval, for example, and their estate administration period prior to plan confirmation takes months if not years. 11 U.S.C. §§ 1206, 1221, 1224. The dissimilarities between Chapter 13 and Chapter 12 preclude dependence on Chapter 13 cases to interpret Section 1222(a)(2)(A).

D. IRC Taxable Entity Provisions Do Not Control Bankruptcy Code Priority Provisions.

The IRC provisions on which the Ninth Circuit relied for its interpretation of Bankruptcy Code 503(b)(1)(B), IRC 1398 and 1399, were enacted two years after the Bankruptcy Code, in 1980. They do not establish Congressional intent in 1978 when it enacted the Bankruptcy Code with its bankruptcy estate priority distribution provision for taxes incurred on account of estate transactions. Congress did enact Bankruptcy Code 346 in 1978, anticipating the Bankruptcy Tax Act, but it did not apply to federal taxation. Current Section 346 simply provides for state and local taxes to be handled consistently with federal taxation. 11 U.S.C. § 346. There is no indication in any statutory language or any legislative history of Bankruptcy Code 346 or the Bankruptcy Tax Act that Congress intended them to have any effect on whether a particular kind of tax claim is entitled to administrative priority payment status. Indeed, "[t]he House of Representatives acknowledged that, historically and in the 1978 version of the

Bankruptcy Code, 'Congress has taken great care to insure that tax policy will not frustrate the operation of bankruptcy.'" *Pacific-Atlantic*, 64 F.3d at 1299 (citing H.R. Rep. No. 95-595, at 274 (1977)).

This Court has repeatedly held that the IRC does not determine the meaning of the Bankruptcy Code. In *United States v. Reorganized CF & I Fabricators*, 518 U.S. 213, 224 (1996), the Court held that the "1978 Act [enacting the Bankruptcy Code] reveals no congressional intent to reject generally the interpretive principle that characterizations in the Internal Revenue Code are not dispositive in the bankruptcy context. . . ." The Court noted multiple Bankruptcy Code provisions where Congress specifically directed the significance for bankruptcy law of a term used elsewhere in federal statutes, including "referential use of the Internal Revenue Code." 518 U.S. at 219. The Court found it "significant, therefore, that Congress included no such reference in § 507(a)(7)(E)," one of the subsections of Bankruptcy Code 507 regarding priority treatment of tax and other claims. 518 U.S. at 220.

In *United States v. Randall*, the IRS argued that an IRC provision stating that withheld taxes are in trust for the United States required a liquidating bankruptcy trustee to turn over funds withheld by the debtor while in Chapter XI, but not paid to the IRS. 401 U.S. 513, 514-16 (1971) (citing 26 U.S.C. § 7501(a)). The Court held that Bankruptcy Code priority provisions control over IRC provisions, such that the IRS had a Chapter XI administrative expense

priority claim that was subordinate to the administrative expense priority claim of the successor trustee when the case was converted to a liquidation. *Id.* at 516-17. As the Court explained, "[w]e deal, however, with a Bankruptcy Act which we conclude is an overriding statement of federal policy on this question of priorities." *Id.* at 515; *see also United States v. Sotelo*, 436 U.S. 268, 275 (1978) ("We . . . cannot agree with the Court of Appeals that the 'penalty' language of Internal Revenue Code § 6672 is dispositive of the status of respondent's debt under Bankruptcy Act § 17(a)(1)(e)"); *United States v. Energy Resources Co.*, 495 U.S. 545, 550 (1990) (Bankruptcy Code authorizes debtor to direct application of tax payments to trust fund liability despite adverse affect on IRS).

Under this authority, the Ninth Circuit's decision to interpret Section 1222(a)(2)(A) by looking to a single provision of the IRC was inappropriate.

E. The IRS Recently Changed Its Historical Position on Administrative Expense Claim Status.

Until the enactment of Section 1222(a)(2)(A), the IRS did not contest the principle that taxes incurred during bankruptcy estate administration have administrative expense priority. To the contrary, it embraced that legal concept in all types of bankruptcy cases, enshrined in multiple decisions of this Court and countless interpretations of the Bankruptcy Act and Bankruptcy Code. The historical position of the

IRS demonstrates the true meaning of the priority provision for administrative expense tax claims, Bankruptcy Code Section 503(b)(1)(B).

IRS arguments that postpetition taxes are administrative expense claims in cases where the bankruptcy filing does not create a separate taxable entity include *United States v. Noland*, 517 U.S. 535, 537 (1996); *United States v. Fleet Bank (In re Calore Express Co.)*, 288 F.3d 22 (1st Cir. 2002); *Hillsborough Holdings*, 116 F.3d at 1393; *Pacific-Atlantic*, 64 F.3d at 1294; *Small Bus. Admin. v. Preferred Door Co., (In re Preferred Door Co.)*, 990 F.2d 547, 548 (10th Cir. 1993); *In re Flo-Lizer, Inc.*, 916 F.2d 363, 365 (6th Cir. 1990); *United States v. Cranshaw (In re Allied Mech. Servs.)*, 885 F.2d 837, 838 (11th Cir. 1989); *see also Holywell Corp. v. Smith*, 503 U.S. 47, 58 n.1 (1992) (IRS conceded in entity Chapter 11 case that liquidating trust was not a separate taxable entity, but that the concession did not affect IRS's position that trust was still liable for tax); I.R.S. Chief Couns. Advice, 200235024 2002 WL 1999525 (Aug. 30, 2002) (stating that postpetition taxes are "entitled to be paid as administrative expenses as long as they are not of the type in B.C. § 507(a)(8)"); I.R.S. Litigation Bulletin 448 (Jan. 1998) ("We also note that there may be cases where the Service will have a basis for asserting the entire tax as an administrative expense, such as where there is no net income prepetition but there is income from the sale of assets by the trustee postpetition.").

The IRS issued a Chief Counsel Advice memorandum after BAPCPA was enacted that addressed the treatment of "administrative claim[s] for federal taxes in a Chapter 12 case." *See* I.R.S. Chief Couns. Advice 200518002, 2005 WL 1060956 (May 6, 2005). In it, the IRS took the position that its administrative expense claims for postpetition taxes must be paid before any creditor with a lower priority claim could be paid. *See id.* This internal policy position shows that the IRS has considered postpetition taxes to be administrative expenses in Chapter 12 cases. Indeed, before Congress enacted Section 1222(a)(2)(A), the IRS argued in at least one Chapter 12 case that a capital gains tax arising from the postpetition sale of a farm asset was an administrative expense that must be paid in full. *See In re Ryan*, 228 B.R. 746, 747 (Bankr. D. Or. 1999).

Given the high priority afforded administrative expense claims, the IRS's position made sense, and appears to have rarely been questioned. In light of Section 1222(a)(2)(A), however, the IRS has changed its tune in Chapter 12 cases, despite no changes to the operative Sections of the IRC or Bankruptcy Code 503 or 507. This Court has rejected prior attempts by the IRS to "espouse[] [a] novel theory" that represents a "sudden and unwarranted volte-face from a consistent administrative and judicial practice." *See*

Fribourg Navigation Co. v. Comm'r, 383 U.S. 272, 279-82 (1966).[7]

IV. Administrative Expense Tax Claims Are Treated and Discharged Under Reorganization Plans to Advance Overall Goals of Bankruptcy Law.

A. Reorganization Plans Must Provide for Administrative Expense Claims.

The Ninth Circuit ruled that the capital gains tax from the Hall Farm sale must be paid by the Halls individually, even though their bankruptcy estate received all the sale proceeds, because it said the Bankruptcy Code only allows a Chapter 12 plan to address prepetition claims. Pet. App. 7-8 n.2. Its rationale was that Chapter 12 plans bind "each creditor" and a "creditor" is an entity that holds a prepetition claim. *Id.* (citing 11 U.S.C. §§ 1227, 101(10)(A)).

In fact, the Bankruptcy Code expressly requires that administrative expense claims, as well as other priority tax claims, be paid in full for any reorganization plan to be confirmed in a Chapter 12 case,

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[7] The Halls recognize that some of the IRS materials they cite in this brief may not be regarded as precedential under IRC Section 6110(k)(3). These materials are not cited for their precedential value, but rather to illustrate the long-standing interpretation of bankruptcy law that even the Government accepted as established. As this Court recognized in *Fribourg*, the Government should not be permitted to attempt to change established law for a perceived advantage.

like Chapter 11 and 13 cases, subject to the exception of Section 1222(a)(2)(A) at issue here. 11 U.S.C. §§ 1222(a)(2), 1129(a)(9)(A), (B), 1322(a)(2). The Chapter 12 trustee is required to make distributions to administrative expense claims prior to or at the same time the trustee makes distributions under the plan to prepetition creditors. 11 U.S.C. § 1226(b)(1).[8] The gist of the Ninth Circuit's position is that postpetition tax claims are entirely outside of the bankruptcy case. *See* Pet. App. 7-8 n.2. The notion that postpetition taxes are excluded from plan treatment is inconsistent with these Bankruptcy Code requirements that they be paid prior to or with other creditors' payments and be paid in full.

The Bankruptcy Code also authorizes a trustee or debtor-in-possession to "request a determination of any unpaid liability of the estate for any tax incurred during the administration of the case" by submitting a tax return and request for an expedited determination to the IRS. 11 U.S.C. § 505(b)(2) (applicable in all types of bankruptcy cases under 11 U.S.C. § 103(a)); *see also* 11 U.S.C. § 1231(b) (authorizing bankruptcy

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[8] The potential that a debtor might not receive a discharge would not warrant payment of Section 1222(a)(2)(A) administrative expense tax claims ahead of unsecured creditor distributions, to be thereafter repaid by the IRS to the Chapter 12 trustee and turned over to other creditors. Rather, the IRS would share in unsecured creditor distributions *pro rata*, and if the court were to later deny the debtor a discharge, the automatic stay would expire and the IRS could then pursue collection of the balance.

court to determine legal questions regarding income tax effects of Chapter 12 plan). These provisions likewise demonstrate that postpetition, pre-confirmation taxes are an integral part of bankruptcy case administration.

The Ninth Circuit is correct that 11 U.S.C. § 1227(a) says that the provisions of a confirmed Chapter 12 plan bind "each creditor," and a "creditor" is defined as the holder of a prepetition claim. A Chapter 12 plan nonetheless binds holders of administrative expense claims treated in the plan by discharging them. Section 1227(a) is the Chapter 12 counterpart to the same language in 11 U.S.C. § 1141(a) for Chapter 11 debtors. In Chapter 11, such postpetition, pre-confirmation claims are discharged by 11 U.S.C. § 1141(d). In Chapter 12 cases, administrative expense claims provided for in the plan are discharged under 11 U.S.C. § 1228(a) ("all debts provided for by the plan allowed under section 503 of this title" are discharged). The Chapter 12 discharge does not take effect until the plan is completed, but the automatic stay continues in effect until the discharge occurs at the end of the plan. 11 U.S.C. § 362(c)(2)(C). If tax claim amounts are not established when the plan is confirmed, and insufficient funds are made available to pay them in full when known, the case may be converted thereafter to a Chapter 7 liquidation or dismissed. *See, e.g., In re Escobedo*, 28 F.3d 34, 35 (7th Cir. 1994).

In any event, the language of Section 1227(a) is not dispositive of Section 1222(a)(2)(A), which applies

to "claims" rather than "creditors," and thus encompasses both pre- and postpetition claims.

B. Debtors in Possession, Not Just Trustees, File Tax Returns for Administrative Expense Tax Claims to Determine Plan Treatment.

The Ninth Circuit also justified its decision that taxes on account of bankruptcy estate asset sales could not be paid as administrative expenses from sale proceeds or under a plan, and would have to be borne by the debtor individually, because the Chapter 12 trustee is not responsible to file tax returns or liable for the tax. Pet. App. 7 (citing 26 U.S.C. § 1398(c)(1) (tax payable by trustee in individual Chapter 7 and 11 cases), and *In re Lindsey*, 142 B.R. 447, 448 (Bankr. D. Okla. 1992) (interpreting specific provisions of a Chapter 12 plan and property sold after plan confirmation, not the administrative expense priority of taxes incurred during administration of the bankruptcy estate)).

The Ninth Circuit is correct that Chapter 12 trustees are not responsible for filing tax returns, at least in cases where the debtor has not been removed as debtor-in-possession. 11 U.S.C. §§ 1202 (trustee's duties), 1204 (removal of debtor as debtor-in-possession). That does not mean that bankruptcy estate transactions are payable only by the individual debtor from his non-estate assets as nondischargeable debts. Rather, the debtor-in-possession files the

return for taxes incurred from bankruptcy estate transactions, with payment from estate assets as a priority or administrative expense claim, and with dischargeability of any deficiency determined in accordance with Bankruptcy Code provisions.

Responsibility for filing tax returns for taxes arising from bankruptcy estate transactions rests on the people in control of estate transactions. *See Nicholas v. United States*, 384 U.S. at 693 & n.27 (trustee appointed during bankruptcy liquidation must file tax return for income earned during period of Chapter XI arrangement); *id.* at 690 ("As an officer of the bankruptcy court, the debtor-in-possession was fully subject to taxes and interest incurred during his operation of the business in the Chapter XI arrangement."); *see also* 28 U.S.C. § 960(a), (b) (persons conducting a business under the authority of a federal court subject to all federal, state and local taxes to same extent as if conducted by a private business, on the due date unless payment excused under a specific Bankruptcy Code provision); *Olson v. Deutscher (In re Nashville White Trucks, Inc.)*, 731 F.2d 376, 377 (6th Cir. 1984) ("[I]t undoubtedly was improper for the debtor-in-possession to have continued the operation of the business without making appropriate provision for the payment of all federal and state taxes as specifically called for by 28 U.S.C. § 960. . . ."); *In re Samuel Chapman, Inc.*, 394 F.2d 340, 341-42 (2d Cir. 1968) (debtor-in-possession is liable under 28 U.S.C. § 960 for failure to make tax returns).

In most bankruptcy reorganization cases, the debtor remains in control of the bankruptcy estate as debtor-in-possession, operating a business and generating money to fund the plan and pay administrative expenses and prepetition creditors under a plan. *See* 11 U.S.C. §§ 1104 (appointment of trustee), 1106(a)(6) (Chapter 11 trustee shall furnish tax return information to governmental unit without personal liability if debtor has not filed return), 1107 (Chapter 11 debtor-in-possession), 1203 (Chapter 12 debtor-in-possession), 1204 (removal of Chapter 12 debtor as debtor-in-possession), 1202(b)(5) (greater trustee role if debtor removed as debtor-in-possession), 1303 (Chapter 13 debtor rights), 1304 (Chapter 13 business debtor). The trustee is generally a "standing trustee" in Chapter 12 and 13 cases with a limited role primarily focused on distributing plan funds to creditors. 11 U.S.C. §§ 1202, 1222(a)(1), 1302, 1322(a)(1); *In re Griner*, 240 B.R. 432, 438 (Bankr. S.D. Ala. 1999); *In re Freeman*, 72 B.R. 850, 854 (Bankr. E.D. Va. 1987). Thus, while responsibility to file tax returns rests on the person in charge of operating bankruptcy estate assets and collecting the taxable income, that person may or may not be a "trustee." 26 U.S.C. §§ 6012(b)(3) (bankruptcy trustee appointed for corporation shall file income tax return), 6062 (corporate tax return to be signed by authorized officer or by its bankruptcy trustee, if appointed), 6012(b)(4) (tax return of estate of individual under Chapter 7 or 11 "shall be made by the fiduciary thereof"); 28 U.S.C. § 960(a), (b) (officers and agents conducting business under authority of a court subject to all taxes).

The person with responsibility to file the tax return is responsible for paying the tax set forth on the return. 26 U.S.C. § 6151(a); *Holywell*, 503 U.S. at 52 (this IRC provision ties the duty to pay federal income taxes to the duty to make an income tax return). In a bankruptcy case, the money that the trustee or debtor-in-possession uses to make the required payments is property of the bankruptcy estate, under the priorities set forth in the Bankruptcy Code. *See Nicholas*, 384 U.S. at 693, n.28 ("Nothing in § 6151 of the Internal Revenue Code, 26 U.S.C. § 6151 (1964 ed.), which obliges the person required to file a return to pay the tax in question, imposes any obligation on the trustee other than in his capacity as the representative of the bankrupt estate."); *Holywell*, 503 U.S. at 53-55 (source of payment not addressed, but Court expressly recognized that trustee held property of bankruptcy estates); *Knight Realty*, 501 F.2d at 66 (interpreting IRC 6151 and other provisions, and holding Chapter XI trustee liable to pay income tax "provided the trustee has possession of, or title to, substantially all the bankrupt's property").

C. Administrative Expense Claims May Be Discharged Under Completed Plans, Including Capital Gains Taxes from Farm Asset Sales in Chapter 12 Cases.

The Ninth Circuit's ruling that the individual debtor is personally liable for postpetition taxes incurred on account of a Bankruptcy Court sale of estate assets during the postpetition, pre-plan confirmation

existence of the bankruptcy estate, before any assets vest back in the debtor under a confirmed plan, makes that debt non-dischargeable as well as non-payable from estate assets. It ignores the specific provisions of Chapter 12 on dischargeability. *See* 11 U.S.C. §§ 1228, 523. It also contravenes the purpose of 11 U.S.C. § 1222(a)(2)(A).

Many years ago, all taxes were non-dischargeable in bankruptcy cases. *See Bruning v. United States*, 376 U.S. 358, 361 (1964) (holding that under Bankruptcy Act of 1898, debtor remained personally liable after his discharge for tax debt and interest not satisfied out of the bankruptcy estate). Now, most prepetition taxes are non-dischargeable in individual bankruptcy cases, including in Chapter 12 cases. *See IRS v. Cousins*, 209 F.3d 38, 41-42 (1st Cir. 2000) (applying *Bruning* in Chapter 12 case); *see also* 11 U.S.C. §§ 1228(a)(2), (c) (incorporating § 523(a)(1)(A)). Administrative expense tax claims are not encompassed by Section 523, but must be paid under the plan or the case will be dismissed and there will be no discharge. 11 U.S.C. §§ 1222(a)(2) (Chapter 12 plan must provide for full payment of all claims entitled to priority under § 507, with a carve-out exception in § 1222(a)(2)(A)); 1228(a) (all "debts" provided for in the plan must be paid in full to obtain discharge); 101(12) ("debt" is a liability on a "claim," and thus includes postpetition as well as prepetition claims provided for in the plan). When a Chapter 12 debtor receives a discharge, it covers administrative expenses. *See* 11 U.S.C. § 1228(a) (providing

for discharge of "all debts provided for by the plan allowed under section 503 of this title"); 8 COLLIER ON BANKRUPTCY ¶ 1228.02[4][a] (discussing scope of Chapter 12 discharge).

Chapter 12 was written for the purpose of permitting family farmers to more easily reorganize their financial affairs than was provided by Chapters 11 or 13. *See Rowley v. Yarnall*, 22 F.3d 190, 193 (8th Cir. 1994); H.R. Rep. 99-958, at 45 (1986) (Conf. Rep.), *as reprinted in* 1986 U.S.C.C.A.N. 5246, 5249 (stating that Chapter 12 is intended to "give family farmers facing bankruptcy a fighting chance to reorganize their debts").[9] They were hamstrung in that fight by the inability to sell farm assets to fund their plans, because resulting capital gains taxes would have to be paid in full. Congress undoubtedly thought that sales of bankruptcy estate assets resulted in administrative expense tax claims in Chapter 12 cases just like all other types of bankruptcy cases. That is what the IRS had long contended, this Court had long held, and Section 503(b)(1)(B) clearly provided. Section 1222(a)(2)(A) was written broadly to

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[9] The Court may seek guidance in congressional purposes that are reflected in the Act in which a particular statute is located. "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature. . . .'" *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

provide an exception to all priority taxes from farm asset sales, including postpetition administrative expense priority tax claims. The whole point of the statute was to enable family farmers to confirm plans that would downsize their farm assets, pay their creditors with sale proceeds, and be discharged from the tax liability arising from the sale.

To benefit by Section 1222(a)(2)(A), the family farmer still must fulfill all plan obligations, because the benefits of this provision are available only if the family farmer debtor receives a discharge. 11 U.S.C. § 1222(a)(2)(A). He still must dedicate any disposable income to the Chapter 12 plan for three to five years. *See* 11 U.S.C. § 1225(b)(1)(B) (which likely precludes individual payment of a substantial capital gains tax as a practical matter). But access to Section 1222(a)(2)(A) allows family farmers like the Halls to use their farm assets to pay secured creditors, use the equity to pay the IRS and other creditors, and proceed with a fresh start and without continuing liability to pay taxes on sale proceeds that were used to pay estate claims. It allows them to use the Bankruptcy Code and Chapter 12 for their intended purpose, disposing of assets in an orderly way under court supervision instead of losing those assets to foreclosing secured creditors. The Halls request the Court to construe Section 1222(a)(2)(A) by its plain terms, which reflects Congress's intent to help distressed family farmers utilize the Bankruptcy Code by removing the major obstacle of obligatory full

payment of a capital gains tax upon the sale of farm assets during a Chapter 12 case.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be reversed and the case remanded for Bankruptcy Court consideration of the Halls' amended plan with capital gains tax treatment under Bankruptcy Code Section 1222(a)(2)(A).

Respectfully submitted,

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11 U.S.C. § 101. Definitions

In this title the following definitions shall apply:

* * *

(10) The term "creditor" means –

(A) entity that has a claim against the debtor or that arose at the time of or before the order for relief concerning the debtor

* * *

(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.

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11 U.S.C. § 103. Applicability of chapters

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.

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11 U.S.C. § 346. Special provisions related to the treatment of State and local taxes

(a) Whenever the Internal Revenue Code of 1986 provides that a separate taxable estate or entity is created in a case concerning a debtor under this title, and the income, gain, loss, deductions, and credits of such estate shall be taxed to or claimed by the estate, a separate taxable estate is also created

for purposes of any State and local law imposing a tax on or measured by income and such income, gain, loss, deductions, and credits shall be taxed to or claimed by the estate and may not be taxed to or claimed by the debtor. The preceding sentence shall not apply if the case is dismissed. The trustee shall make tax returns of income required under any such State or local law.

(b) Whenever the Internal Revenue Code of 1986 provides that no separate taxable estate shall be created in a case concerning a debtor under this title, and the income, gain, loss, deductions, and credits of an estate shall be taxed to or claimed by the debtor, such income, gain, loss, deductions, and credits shall be taxed to or claimed by the debtor under a State or local law imposing a tax on or measured by income and may not be taxed to or claimed by the estate. The trustee shall make such tax returns of income of corporations and of partnerships as are required under any State or local law, but with respect to partnerships, shall make such returns only to the extent such returns are also required to be made under such Code. The estate shall be liable for any tax imposed on such corporation or partnership, but not for any tax imposed on partners or members.

(c) With respect to a partnership or any entity treated as a partnership under a State or local law imposing a tax on or measured by income that is a debtor in a case under this title, any gain or loss resulting from a distribution of property from such partnership, or any distributive share of any income, gain, loss, deduction, or credit of a partner or member

that is distributed, or considered distributed, from such partnership, after the commencement of the case, is gain, loss, income, deduction, or credit, as the case may be, of the partner or member, and if such partner or member is a debtor in a case under this title, shall be subject to tax in accordance with subsection (a) or (b).

(d) For purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor in a case under this title shall terminate only if and to the extent that the taxable period of such debtor terminates under the Internal Revenue Code of 1986.

(e) The estate in any case described in subsection (a) shall use the same accounting method as the debtor used immediately before the commencement of the case, if such method of accounting complies with applicable nonbankruptcy tax law.

(f) For purposes of any State or local law imposing a tax on or measured by income, a transfer of property from the debtor to the estate or from the estate to the debtor shall not be treated as a disposition for purposes of any provision assigning tax consequences to a disposition, except to the extent that such transfer is treated as a disposition under the Internal Revenue Code of 1986.

(g) Whenever a tax is imposed pursuant to a State or local law imposing a tax on or measured by income pursuant to subsection (a) or (b), such tax shall be imposed at rates generally applicable to the same types of entities under such State or local law.

(h) The trustee shall withhold from any payment of claims for wages, salaries, commissions, dividends, interest, or other payments, or collect, any amount required to be withheld or collected under applicable State or local tax law, and shall pay such withheld or collected amount to the appropriate governmental unit at the time and in the manner required by such tax law, and with the same priority as the claim from which such amount was withheld or collected was paid.

(i) (1) To the extent that any State or local law imposing a tax on or measured by income provides for the carryover of any tax attribute from one taxable period to a subsequent taxable period, the estate shall succeed to such tax attribute in any case in which such estate is subject to tax under subsection (a).

(2) After such a case is closed or dismissed, the debtor shall succeed to any tax attribute to which the estate succeeded under paragraph (1) to the extent consistent with the Internal Revenue Code of 1986.

(3) The estate may carry back any loss or tax attribute to a taxable period of the debtor that ended before the date of the order for relief under this title to the extent that –

(A) applicable State or local tax law provides for a carryback in the case of the debtor; and

(B) the same or a similar tax attribute may be carried back by the estate to such a

taxable period of the debtor under the Internal Revenue Code of 1986.

(j) (1) For purposes of any State or local law imposing a tax on or measured by income, income is not realized by the estate, the debtor, or a successor to the debtor by reason of discharge of indebtedness in a case under this title, except to the extent, if any, that such income is subject to tax under the Internal Revenue Code of 1986.

(2) Whenever the Internal Revenue Code of 1986 provides that the amount excluded from gross income in respect of the discharge of indebtedness in a case under this title shall be applied to reduce the tax attributes of the debtor or the estate, a similar reduction shall be made under any State or local law imposing a tax on or measured by income to the extent such State or local law recognizes such attributes. Such State or local law may also provide for the reduction of other attributes to the extent that the full amount of income from the discharge of indebtedness has not been applied.

(k) (1) Except as provided in this section and section 505, the time and manner of filing tax returns and the items of income, gain, loss, deduction, and credit of any taxpayer shall be determined under applicable nonbankruptcy law.

(2) For Federal tax purposes, the provisions of this section are subject to the Internal Revenue Code of 1986 and other applicable Federal nonbankruptcy law.

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11 U.S.C. § 503. Allowance of administrative expenses

* * *

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

(1) * * *

(B) any tax –

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

* * *

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

* * *

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11 U.S.C. § 507. Priorities

(a) The following expenses and claims have priority in the following order:

* * *

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

* * *

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for –

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition –

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of –

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

* * *

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11 U.S.C. § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty –

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

* * *

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11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

* * *

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

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11 U.S.C. § 1203. Rights and powers of debtor

Subject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee

serving in a case under chapter 11, including operating the debtor's farm or commercial fishing operation.

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11 U.S.C. § 1207. Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title –

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first.

(b) Except as provided in section 1204, a confirmed plan, or an order confirming a plan, the debtor shall remain in possession of all property of the estate.

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11 U.S.C. § 1222. Contents of plan

(a) The plan shall –

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; or

(B) the holder of a particular claim agrees to a different treatment of that claim;

* * *

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11 U.S.C. § 1225. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if –

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title

* * *

(b) (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

* * *

(B) the plan provides that all of the debtor's projected disposable income to be

received in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or

* * *

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11 U.S.C. § 1226. Payments

* * *

(b) Before or at the time of each payment to creditors under the plan, there shall be paid –

(1) any unpaid claim of the kind specified in section 507(a)(2) of this title; and

* * *

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11 U.S.C. § 1227. Effect of confirmation

(a) Except as provided in section 1228(a) of this title, the provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor, whether or not the claim of such creditor, such equity security holder, or such general partner in the debtor is provided for by the plan, and whether or not such creditor, such equity security holder, or such general partner in the debtor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

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11 U.S.C. § 1228. Discharge

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(9) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

(2) of the kind specified in section 523(a) of this title.

* * *

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

(2) of a kind specified in section 523(a) of this title.

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11 U.S.C. § 1305. Filing and allowance of post-petition claims

(a) A proof of claim may be filed by any entity that holds a claim against the debtor –

(1) for taxes that become payable to a governmental unit while the case is pending; or

(2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.

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26 U.S.C. § 1398. Rules relating to individuals' title 11 cases

(a) Cases to which section applies – Except as provided in subsection (b), this section shall apply to any case under chapter 7 (relating to liquidations) or

chapter 11 (relating to reorganizations) of title 11 of the United States Code in which the debtor is an individual.

* * *

(d) Taxable year of debtors

(1) General rule – Except as provided in paragraph (2), the taxable year of the debtor shall be determined without regard to the case under title 11 of the United States Code to which this section applies.

(2) Election to terminate debtor's year when case commences.

(A) In general – Notwithstanding section 442, the debtor may (without the approval of the Secretary) elect to treat the debtor's taxable year which includes the commencement date as 2 taxable years –

(i) the first of which ends on the day before the commencement date, and

(ii) the second of which begins on the commencement date.

(B) Spouse may join in election – In the case of a married individual (within the meaning of section 7703), the spouse may elect to have the debtor's election under subparagraph (A) also apply to the spouse, but only if the debtor and the spouse file a joint return for the taxable year referred to in subparagraph (A)(i).

(C) No election where debtor has no assets – No election may be made under subparagraph (A) by a debtor who has no assets other than property which the debtor may treat as exempt property under section 522 of title 11 of the United States Code.

(D) Time for making election – An election under subparagraph (A) or (B) may be made only on or before the due date for filing the return for the taxable year referred to in subparagraph (A)(i). Any such election, once made, shall be irrevocable.

(E) Returns – A return shall be made for each of the taxable years specified in subparagraph (A).

(F) Annualization – For purposes of subsections (b), (c), and (d) of section 443, a return filed for either of the taxable years referred to in subparagraph (A) shall be treated as a return made under paragraph (1) of subsection (a) of section 443.

(3) Commencement date defined – For purposes of this subsection, the term "commencement date" means the day on which the case under title 11 of the United States Code to which this section applies commences.

(e) Treatment of income, deductions, and credits

(1) Estate's share of debtor's income. – The gross income of the estate for each taxable year shall include the gross income of the debtor to which the estate is entitled under title 11 of the United States

Code. The preceding sentence shall not apply to any amount received or accrued by the debtor before the commencement date (as defined in subsection (d)(3)).

(2) Debtor's share of debtor's income. – The gross income of the debtor for any taxable year shall not include any item to the extent that such item is included in the gross income of the estate by reason of paragraph (1).

(3) Rule for making determinations with respect to deductions, credits, and employment taxes – Except as otherwise provided in this section, the determination of whether or not any amount paid or incurred by the estate –

(A) is allowable as a deduction or credit under this chapter, or

(B) is wages for purposes of subtitle C, shall be made as if the amount were paid or incurred by the debtor and as if the debtor were still engaged in the trades and businesses, and in the activities, the debtor was engaged in before the commencement of the case.

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26 U.S.C. § 1399. No separate taxable entities for partnerships, corporations, etc

Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code.

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26 U.S.C. § 6012. Persons required to make returns of income

* * *

(b) Returns made by fiduciaries and receivers

* * *

(3) Receivers, trustees and assignees for corporations – In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts – Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

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26 U.S.C. § 6151. Time and place for paying tax shown on returns

(a) General rule – Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with

whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

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26 U.S.C. § 6658. Coordination with title 11

(a) Certain failures to pay tax – No addition to the tax shall be made under section 6651, 6654, or 6655 for failure to make timely payment of tax with respect to a period during which a case is pending under title 11 of the United States Code –

(1) if such tax was incurred by the estate and the failure occurred pursuant to an order of the court finding probable insufficiency of funds of the estate to pay administrative expenses, or

(2) if –

(A) such tax was incurred by the debtor before the earlier of the order for relief or (in the involuntary case) the appointment of a trustee, and

(B) (i) the petition was filed before the due date prescribed by law (including extensions) for filing a return of such tax, or

(ii) the date for making the addition to the tax occurs on or after the day on which the petition was filed.

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28 U.S.C. § 960. Tax liability

(a) Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

(b) A tax under subsection (a) shall be paid on or before the due date of the tax under applicable nonbankruptcy law, unless –

(1) the tax is a property tax secured by a lien against property that is abandoned under section 554 of title 11, within a reasonable period of time after the lien attaches, by the trustee in a case under title 11; or

(2) payment of the tax is excused under a specific provision of title 11.

RESPONDENT'S BRIEF

No. 10-875

In the Supreme Court of the United States

LYNWOOD D. HALL AND BRENDA A. HALL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 11 U.S.C. 1222(a)(2)(A) authorizes the bankruptcy court, in a case brought under Chapter 12 of the Bankruptcy Code, to treat as a dischargeable non-priority claim a federal tax debt arising out of the debtor's post-petition sale of a farm asset.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 617 F.3d 1161. The opinion of the district court (Pet. App. 18-33) is reported at 393 B.R. 857. The opinion of the bankruptcy court (Pet. App. 34-46) is reported at 376 B.R. 741.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2010. A petition for rehearing was denied on October 1, 2010 (Pet. App. 47). The petition for a writ of certiorari was filed on December 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Chapter 12 of the Bankruptcy Code addresses debts of family farmers and fishermen. Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, Section 1222(a)(2)(A) of the Code permits family farmers to treat certain governmental claims resulting from the disposition of farm assets as general unsecured claims, which are not entitled to priority status and are dischargeable after less than full payment under the bankruptcy plan. Section 1222 provides in relevant part:

> § 1222. Contents of Plan
>
> (a) The plan shall—
>
> * * * * *
>
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—
>
> (A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge.

11 U.S.C. 1222(a)(2)(A).

Section 507, in turn, accords priority status to enumerated categories of claims and expenses. In relevant part, Section 507 states that "[t]he following expenses and claims have priority in the following order: * * *

second, administrative expenses allowed under Section 503(b) of this title." 11 U.S.C. 507(a)(2). Section 503(b) includes in its enumeration of allowable administrative expenses "any tax * * * incurred by the estate." 11 U.S.C. 503(b)(1)(B)(i).[1]

b. Section 1399 of the Internal Revenue Code states that "[e]xcept in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under [the Bankruptcy Code]." 26 U.S.C. 1399. Section 1398 applies, with certain exceptions that are not relevant here, to "any case under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of [the Bankruptcy Code] in which the debtor is an individual." 26 U.S.C. 1398(a).

2. a. On August 9, 2005, petitioners filed for Chapter 12 bankruptcy relief.[2] The bankruptcy court granted petitioners' motion to sell their 320-acre farm for $960,000, and the ensuing post-petition sale produced a capital-gains federal income tax liability in the amount of $29,000. As set forth in their first amended plan, petitioners proposed to treat the tax debt as a dischargeable unsecured liability. The United States objected to the proposed treatment of petitioners' post-petition tax debt. The government argued that, in part because a Chapter 12 bankruptcy estate does not constitute a sep-

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[1] Section 503(b) excepts taxes specified in Section 507(a)(8), which accords separate priority to certain pre-petition taxes. There is no dispute that the taxes at issue in this case arose after the filing of the bankruptcy petition, so Section 507(a)(8) is not at issue in this case.

[2] Although most of BAPCPA's amendments apply only to cases filed on or after October 17, 2005, Section 1222(a)(2)(A) became effective on the date of BAPCPA's enactment, April 20, 2005. Pub. L. No. 109-8, § 1003(c), 119 Stat. 23, 186. Accordingly, Section 1222(a)(2)(A) governs this case if it is otherwise applicable. Pet. App. 35 n.2.

arate taxable entity that can incur post-petition income tax liabilities, the debt was not dischargeable in bankruptcy but would instead remain the independent responsibility of petitioners. Pet. App. 35.

Petitioners argued that a Chapter 12 debtor can treat post-petition income taxes as administrative expenses of the bankruptcy estate under Section 503, and that such expenses are stripped of priority by Section 1222(a)(2)(A) and therefore may be discharged after less than full payment, even though a Chapter 12 estate is not a separate taxable entity. Pet. App. 36, 41 (citing *In re Knudsen*, 356 B.R. 480, 489-492 (Bankr. N.D. Iowa 2006), aff'd in part, rev'd in part, 389 B.R. 643 (N.D. Iowa 2008), aff'd, 581 F.3d 696 (8th Cir. 2009)). Petitioners noted that the bankruptcy court in *Knudsen* had accepted that contention, based on its view that Congress intended Section 1222(a)(2)(A) to lessen the burdens imposed by both pre-petition and post-petition taxes arising from the sale of farm assets. *Id.* at 45.

b. The bankruptcy court sustained the government's objection to petitioners' proposed Chapter 12 plan. Pet. App. 34-46. The court agreed with the government that the applicability of Section 1222(a)(2)(A) turned on whether the post-petition tax liability could be "incurred by the estate" pursuant to 11 U.S.C. 503(b)(1)(B). Pet. App. 37-39. The court explained that, given the interplay between the Bankruptcy Code and the Internal Revenue Code, Section 503(b)(1)(B)(i) must be read consistently with 26 U.S.C. 1398 and 1399. Sections 1398 and 1399 of the Internal Revenue Code establish that a Chapter 12 bankruptcy filing does not create a separate taxable entity. The bankruptcy court held that, in light of those provisions, "the capital gains tax arising from the postpetition sale of the farm land cannot be a

tax 'incurred' by the Chapter 12 Estate under § 503(b)(1)(B)(i)." Pet. App. 44; see *id.* at 42-44 (citing *In re Brown*, No. 05-41071, 2006 WL 3370867 (Bankr. D. Mass. Nov. 20, 2006) (finding that a Chapter 13 estate cannot be held liable for capital gains tax because it does not exist as a taxable entity)). The court observed that its ruling would not render Section 1222(a)(2)(A) superfluous because, "as written, § 1222(a)(2)(A) creates an exception for priority claims arising from the *prepetition* sale, transfer or exchange of farm assets." *Id.* at 45-46.

c. The district court reversed. Pet. App. 18-33. The district court agreed with the conclusion of the bankruptcy court in *In re Dawes*, 382 B.R. 509 (Bankr. D. Kan. 2008), aff'd, 415 B.R. 815 (D. Kan. 2009), appeal pending, No. 09-3129 (10th Cir.), which had rejected the government's argument that Section 503(b)(1)(B)(i) requires the existence of a separate taxable estate. Pet. App. 30. The district court quoted *Dawes* for the proposition that "[a]lthough IRC §§ 1398 and 1399 were in place at the time of BAPCPA, this court has been unable to find any Chapter 12, or even any Chapter 7 or Chapter 11 case, where those IRC provisions were held to be relevant to the construction of the definition of administrative claim in § 503(b)(1)(B)(i)." *Ibid.* (quoting 382 B.R. at 520). The court also agreed with the bankruptcy courts in *Knudsen* and in *In re Schilke*, 379 B.R. 899 (Bankr. D. Neb. 2007), aff'd, 2008 WL 4224279 (D. Neb. Sept. 9, 2008), aff'd, *sub nom. Knudsen* v. *IRS*, 581 F.3d 696 (8th Cir. 2009), both of which had relied in part on legislative history in concluding that 11 U.S.C. 1222(a)(2)(A) applies to post-petition as well as pre-petition taxes. Pet. App. 31.

3. The court of appeals reversed the district court's judgment. Pet. App. 1-17. The court explained that, because a Chapter 12 estate is not a separate taxable entity under Sections 1398 and 1399 of the Internal Revenue Code, "a chapter 12 estate cannot incur taxes." *Id.* at 6. The court relied in part on case law reaching the same conclusion for Chapter 13 estates. *Ibid.* (citations omitted). The court concluded that "[b]ecause a chapter 12 estate cannot 'incur' a tax," petitioners' post-petition tax liability does not constitute an "administrative expense" within the meaning of Section 503(b) (thereby entitled to priority treatment under Section 507(a)(2)), and petitioners therefore "cannot get the benefit of section 1222(a)(2)(A)." *Ibid.*

The court of appeals recognized that its conclusion was contrary to that reached by the Eighth Circuit in *Knudsen* v. *IRS*, 581 F.3d 696 (2009), but the court found the Eighth Circuit's reasoning unpersuasive. Pet. App. 8-13. In particular, the Ninth Circuit disagreed with the Eighth Circuit's refusal to look to the Internal Revenue Code when determining whether a post-petition tax debt was "incurred by the estate." *Id.* at 11-13. The Ninth Circuit noted that the Bankruptcy Code standing alone does not resolve whether a Chapter 12 estate can incur taxes, and that "Congress has indicated repeatedly that it is aware that the taxable entity provisions in the Internal Revenue Code are relevant to the Bankruptcy Code." *Id.* at 12.

The Ninth Circuit also noted that petitioners could not avoid the post-petition tax liability simply by including that liability in their plan, because "the Bankruptcy Code places limits on the liabilities a plan may address." Pet. App. 8 n.2. Citing Section 1227 of the Bankruptcy

Code, the court explained that a Chapter 12 plan generally is limited to pre-petition claims. *Ibid.*

Judge Paez dissented. Pet. App. 16-17. Based on his view that Congress intended Section 1222(a)(2)(A) to help family farmers, "regardless of whether they sold the assets before or after filing their Chapter 12 petition," he would have held that petitioners could "treat the capital gains taxes arising from the post-petition sale of their farm assets as an unsecured claim." *Id.* at 16.

ARGUMENT

The court of appeals correctly held that petitioners could not obtain a discharge, through their Chapter 12 bankruptcy plan, of a tax liability arising from their post-petition sale of a farm asset. In Chapter 12 (and Chapter 13) bankruptcy proceedings, the general rule is that liabilities incurred after the petition is filed are not dischargeable in bankruptcy. The provision of law on which petitioners rely, 11 U.S.C. 1222(a)(2)(A), does not establish an exception to that general rule, but rather applies only to claims that arise before the bankruptcy petition is filed.

Although the decision below is correct, another court of appeals, the Eighth Circuit, has resolved the question presented in a contrary manner, and the same issue is presented in several cases pending in the lower courts. In light of the square circuit conflict, and the importance of uniform administration of federal tax and bankruptcy laws, the petition for a writ of certiorari should be granted.

1. The court of appeals correctly held that petitioners could not include in the Chapter 12 plan and treat as

a dischargeable non-priority claim a tax liability arising from their sale of farm property.

a. The asset sale at issue took place, and petitioners thereby incurred liability for federal income tax on the resulting capital gain, after their Chapter 12 bankruptcy petition had been filed. Pet. App. 2. "As a general rule, bankruptcy proceedings do not address postpetition claims: 'The basic scheme of the Bankruptcy Code is to affect claims arising prior to the filing of the petition under title 11.'" *United States* v. *Ripley*, 926 F.2d 440, 443 (5th Cir. 1991) (quoting 5 Lawrence P. King, *Collier on Bankruptcy* ¶ 1305.01[1] (15th ed. 1988) (footnotes omitted)).

The specific provisions of Chapter 12 reinforce that general principle. A Chapter 12 plan does not bind holders of post-petition liabilities, but rather binds "creditors." See 11 U.S.C. 1227(a) ("the provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor"); see also 11 U.S.C. 501(a) (stating that a "creditor" may file a "proof of claim"). As the court of appeals noted (Pet. App. 8 n.2), the Bankruptcy Code defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor," 11 U.S.C. 101(10)(A), *i.e.*, a holder of a *pre*-petition claim.[3] Although the term "creditor" also includes holders of the few post-petition claims expressly designated in 11 U.S.C. 101(10)(B), the type of post-petition tax liability at issue in this case is not among them.

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[3] The commencement of a case, *i.e.*, the filing of the bankruptcy petition, constitutes the order for relief in a voluntary bankruptcy case. 11 U.S.C. 301.

Section 507(a)(8)(A) of the Bankruptcy Code designates certain *pre*-petition income tax debts as priority claims. 11 U.S.C. 507(a)(8)(A). Under Section 1222(a)(2), a Chapter 12 plan must "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507." 11 U.S.C. 1222(a)(2). *Post*-petition income tax liabilities do not trigger that requirement—*i.e.*, a Chapter 12 plan does not provide for payment of such claims and such debts are not dischargeable in a Chapter 12 bankruptcy. Rather, they remain personal obligations of the individual debtor, subject to collection through such mechanisms as are otherwise available outside the framework of the bankruptcy case.

b. Section 1222(a)(2)(A) does not alter the established distinction between pre-petition and post-petition debts, nor does it bring within a Chapter 12 case debts that would otherwise be subject to collection outside the bankruptcy framework. The special relief offered by Section 1222(a)(2)(A) is an exception to Section 1222(a)(2)'s preexisting general rule that a Chapter 12 plan must provide for full payment of "claims entitled to priority under section 507." 11 U.S.C. 1222(a)(2). Section 1222(a)(2)(A) provides that certain debts resulting from the disposition of farm assets "shall be treated as * * * unsecured claim[s] that [are] not entitled to priority." 11 U.S.C. 1222(a)(2)(A). That provision allows the bankruptcy court to confirm a Chapter 12 plan even though it does not provide for full payment of claims that would otherwise be entitled to priority under Section 507, and it permits the eventual discharge of such claims after the debtor has made all payments required by the plan. See 11 U.S.C. 1228(a).

As an exception to Section 1222(a)(2), however, Section 1222(a)(2)(A) is necessarily limited to the types of claims that would otherwise be covered by a Chapter 12 plan. Section 1222(a)(2)(A) strips certain claims of priority status, and thus divests the creditor of his right to full payment, but it does not bring within the Chapter 12 case any claims that would otherwise be collected outside the bankruptcy framework. Although the Bankruptcy Code provides for payment of certain post-petition administrative expenses,[4] post-petition income taxes (like most other post-petition debts) remain the personal responsibility of individual Chapter 12 debtors. Section 1222(a)(2)(A) does not alter that pre-existing rule.

c. As set forth above (pp. 2-3, *supra*), Section 1222(a)(2)(A) applies to certain governmental claims that would otherwise constitute priority claims under Section 507. Section 507 enumerates ten categories of expenses and claims that are entitled to priority status, including two categories that address taxes: (1) claims for certain pre-petition taxes (11 U.S.C. 507(a)(8)), and (2) administrative expenses (11 U.S.C. 507(a)(2)), which include certain taxes (11 U.S.C. 503(b)(1)(B)). Because the tax at issue in this case arises out of a sale of land

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[4] Chapter 12 establishes a special procedure for the payment of post-petition administrative expenses. Section 1226(b)(1) states that "[b]efore or at the time of each payment to creditors under the plan, there shall be paid * * * any unpaid claim of the kind specified in section 507(a)(2)." 11 U.S.C. 1226(b)(1). Section 1226(b)(1) thus ensures that holders of post-petition obligations of the kind specified in Section 507(a)(2)—i.e., administrative expenses such as payments owed to bankruptcy professionals, see 11 U.S.C. 503(b)—are paid in full even though those obligations arise after the filing of the bankruptcy petition. Accordingly, the government's interpretation of Section 1222(a)(2)(A) is fully consistent with the Code's policy of providing for payment of post-petition administrative expenses.

after the filing of the Chapter 12 petition, Section 507(a)(8) does not apply. See note 1, *supra*. To trigger special treatment under Section 1222(a)(2)(A), therefore, the post-petition tax must fall under Section 507(a)(2), *i.e.*, qualify as an "administrative expense[] allowed under section 503(b)." 11 U.S.C. 507(a)(2). Section 503(b), in turn, covers in relevant part "any tax * * * incurred by the estate." 11 U.S.C. 503(b)(1)(B).

Assuming administrative expenses are covered by Section 1222(a)(2) at all, the question becomes whether the tax at issue was "incurred by the estate." That inquiry, which is informed by the Internal Revenue Code, depends on the chapter under which bankruptcy protection is sought and on the nature of the debtor. A bankruptcy filing generally does not create a separate taxable entity, 26 U.S.C. 1399, except in the instance of an individual debtor who files for Chapter 7 or Chapter 11 bankruptcy protection, 26 U.S.C. 1398. See p. 3, *supra*.[5] Because no separate taxable entity exists for an individual Chapter 12 debtor, and no other provision (in either the Bankruptcy Code or the Internal Revenue Code) imposes income tax liability on a Chapter 12 estate,[6] the court of appeals correctly concluded that any post-peti-

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[5] The provisions of 26 U.S.C. 1398 and 1399 apply only to income taxes, and income taxes are at issue in this case. This case does not present the question whether other federal taxes may be incurred by the estate in a Chapter 12 case.

[6] Under 26 U.S.C. 6012(b)(3), a corporation's bankruptcy trustee is responsible for filing the debtor corporation's federal income tax returns. See also 11 U.S.C. 704(a)(8), 1106(a)(1), 1203. Under the Internal Revenue Code, the duty to make the tax return causes the estate to be liable for the federal income tax. See 26 U.S.C. 6151(a); *Holywell Corp.* v. *Smith*, 503 U.S. 47, 52 (1992); see also 28 U.S.C. 960. Thus, in the case of corporate debtors, federal income taxes are "incurred by the estate."

tion taxes arising out of petitioners' sale of farm assets could not have been "incurred by the estate." See Pet. App. 6a-7a. That conclusion is reinforced by case law establishing that a Chapter 13 estate, which is treated identically to a Chapter 12 estate by Sections 1398 and 1399, cannot incur taxes. See, *e.g.*, *In re Whall*, 391 B.R. 1, 5-6 (Bankr. D. Mass. 2008); *In re Brown*, No. 05-41071, 2006 WL 3370867, *3 (Bankr. D. Mass. Nov. 20, 2006); *In re Gyulafia*, 65 B.R. 913, 916 (Bankr. D. Kan. 1986).

Acceptance of petitioners' position would also create an unwarranted conflict between Sections 1222(a)(2) and 1226(b)(1) of the Bankruptcy Code. Section 1226(b)(1) provides that unpaid claims for administrative expenses must be paid "[b]efore or at the time of each payment to creditors under the plan," 11 U.S.C. 1226(b)(1); see note 4, *supra*, and it contains no exception for debts owed to governmental units arising from the sale of farm assets. If petitioners' post-petition tax debt is held (as petitioners urge) to be a claim for administrative expenses covered by Section 507(a)(2), then Section 1222(a)(2)(A) allows it to be treated as an unsecured non-priority claim (thereby rendering it dischargeable after less than full payment), while Section 1226(b)(1) requires it to be paid at or before the time payments are made to other creditors. If properly confined to pre-petition liabilities, by contrast, Section 1222(a)(2)(A) creates no such conflict, since pre-petition debts cannot qualify as administrative expenses.

2. Although the decision of the court of appeals is correct, the petition for a writ of certiorari should be granted to resolve a square circuit conflict on the question presented.

a. As petitioner explains (Pet. 7-10), the Ninth Circuit's decision below conflicts with that of the Eighth Circuit in *Knudsen* v. *IRS*, 581 F.3d 696 (2009). See Pet. App. 8-13. The Eighth Circuit concluded that Section 1222(a)(2)(A) applies to federal tax liabilities arising out of a Chapter 12 debtor's post-petition sale of a farm asset. *Knudsen*, 581 F.3d at 704-710. The Eighth Circuit rejected the argument (endorsed by the Ninth Circuit, Pet. App. 8 n.2) that the Bankruptcy Code limits the scope of the liabilities encompassed by a Chapter 12 plan to those arising before the petition is filed. The Eighth Circuit concluded that "nothing in [Section 1222(a)(2)(A)] restricts its application to only those dispositions that occur before the debtor files his bankruptcy petition." 581 F.3d at 706. The Eighth Circuit also rejected the argument (adopted by the Ninth Circuit, Pet. App. 6-7) that because 26 U.S.C. 1398 and 1399 establish that a Chapter 12 bankruptcy does not result in a separate taxable entity, the estate cannot incur taxes as needed to trigger Section 1222(a)(2)(A). 581 F.3d at 708-710. In rejecting that contention, the Eighth Circuit interpreted the phrase "incurred by the estate" in Section 503(b)(1)(B)(i) to mean simply "incurred post-petition." *Id.* at 708.

b. Although the Eighth and Ninth Circuits are the only two courts of appeals to have decided the question presented, the same question is presented in two cases pending in the Tenth Circuit,[7] and several similar cases are pending before various bankruptcy and district courts. The recent proliferation of these cases reflects the upward trend in Chapter 12 bankruptcy filings. See

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[7] *In re Dawes*, No. 09-3129 (10th Cir. argued Nov. 17, 2010); *Ficken* v. *IRS*, No. 10-1276 (10th Cir. oral argument unscheduled).

Pet. 16-17. In terms of its impact on the United States Treasury, the amount of tax liability at issue in any particular case of this nature is typically modest. There is, however, a significant governmental and public interest in the uniform administration of federal tax and bankruptcy laws. Accordingly, the United States agrees that this Court should grant review to resolve the conflict between the Eighth and Ninth Circuits regarding the proper treatment in Chapter 12 bankruptcy proceedings of post-petition tax liabilities resulting from the sale of farm assets.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2011

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QUESTION PRESENTED

Whether 11 U.S.C. 1222(a)(2)(A) authorizes the bankruptcy court, in a case brought under Chapter 12 of the Bankruptcy Code, to treat as a dischargeable non-priority claim a federal income tax debt arising out of the debtor's post-petition sale of a farm asset.

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In the Supreme Court of the United States

No. 10-875

LYNWOOD D. HALL AND BRENDA A. HALL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 617 F.3d 1161. The opinion of the district court (Pet. App. 18-33) is reported at 393 B.R. 857. The opinion of the bankruptcy court (Pet. App. 34-46) is reported at 376 B.R. 741.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2010. A petition for rehearing was denied on October 1, 2010 (Pet. App. 47). The petition for a writ of certiorari was filed on December 30, 2010, and was granted on June 13, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

Pertinent statutory provisions and provisions of the Internal Revenue Manual are set forth in an appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

1. a. Chapter 12 of the Bankruptcy Code (11 U.S.C.) addresses certain debts of family farmers and fishermen. A Chapter 12 plan binds each "creditor," 11 U.S.C. 1227(a), which the Code defines as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor," 11 U.S.C. 101(10)(A).[1] Section 1222 identifies the types of claims that may be included in the Chapter 12 plan. 11 U.S.C. 1222. Once a debtor completes payments pursuant to the plan, Section 1228(a) authorizes a discharge of all debts provided for by the plan (with certain exceptions). 11 U.S.C. 1228(a).

Section 1222(a)(2)(A), which was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, permits family farmers to treat certain governmental claims resulting from the disposition of farm assets as unsecured claims, which are not entitled to priority status and are dischargeable after less than full payment under the Chapter 12 plan. That provision states:

§ 1222. Contents of Plan

(a) The plan shall—

* * * * *

---

[1] The commencement of a case, *i.e.*, the filing of the bankruptcy petition, constitutes the order for relief in a voluntary bankruptcy case. 11 U.S.C. 301.

> (2) provide for the full payment, in deferred cash payment, of all claims entitled to priority under section 507, unless—
>
> > (A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge.

11 U.S.C. 1222(a)(2)(A).

Section 507 of the Code accords priority status to enumerated categories of claims and expenses. In relevant part, Section 507(a) states that "[t]he following expenses and claims have priority in the following order: * * * (2) Second, administrative expenses allowed under section 503(b) of this title," 11 U.S.C. 507(a)(2), and "(8) Eighth, * * * [certain] tax[es] on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition," 11 U.S.C. 507(a)(8)(A). Section 503(b), in turn, includes in its enumeration of allowable administrative expenses the costs of "services rendered [to the estate] after the commencement of the case," 11 U.S.C. 503(b)(1)(A)(i), and "any tax * * * incurred by the estate," 11 U.S.C. 503(b)(1)(B)(i).

In Chapter 12 cases, Section 1226(b)(1) establishes a special procedure for the payment of allowable administrative expenses. Section 1226(b)(1) states that "[b]efore or at the time of each payment to creditors under the plan, there shall be paid * * * any unpaid claim of the kind specified in section 507(a)(2)," 11 U.S.C. 1226(b)(1), *i.e.*, administrative expenses allowed under Section 503(b).

b. Section 1399 of the Internal Revenue Code states that "[e]xcept in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under [the Bankruptcy Code]." 26 U.S.C. 1399. Section 1398 applies, with certain exceptions not relevant here, to "any case under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of [the Bankruptcy Code] in which the debtor is an individual." 26 U.S.C. 1398(a).

2. a. On August 9, 2005, petitioners filed for Chapter 12 bankruptcy relief.[2] J.A. 1. The bankruptcy court subsequently granted petitioners' motion to sell their 320-acre farm for $960,000, J.A. 19-24, and the ensuing post-petition sale produced a capital gain that increased petitioners' overall federal income tax liability by approximately $29,000, J.A. 35. As set forth in their first amended plan, petitioners proposed to treat the tax debt as a dischargeable unsecured liability. J.A. 35-36.

Petitioners argued that a Chapter 12 debtor can treat post-petition income taxes as "administrative expenses" of the bankruptcy estate under Section 503(b)(1)(B), even though a Chapter 12 estate is not a "separate taxable entity." Although administrative expenses ordinarily would be entitled to priority under Section 507(a)(2), petitioners argued that the income taxes at issue here are stripped of priority by operation of Section 1222(a)(2)(A). Petitioners contended that their post-petition tax liability therefore could be discharged after less than full payment. Pet. App. 36, 41 (citing *In re Knudsen*, 356 B.R. 480 (Bankr. N.D. Iowa 2006), aff'd in part, rev'd in part, 389 B.R. 643 (N.D.

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[2] Although BAPCPA is generally effective for cases filed on or after October 17, 2005, BAPCPA's changes to Section 1222 were made effective to cases filed on or after the date of its enactment (April 20, 2005). See BAPCPA §§ 1003(c), 1501, 119 Stat. 186, 216.

Iowa 2008), aff'd, 581 F.3d 696 (8th Cir. 2009)). The United States objected to the proposed treatment of petitioners' post-petition tax debt, arguing that the debt was neither collectible nor dischargeable in bankruptcy but would instead remain the independent responsibility of petitioners. J.A. 43-47.

b. The bankruptcy court sustained the government's objection to petitioners' proposed Chapter 12 plan. Pet. App. 34-46. The court agreed with the government that the applicability of Section 1222(a)(2)(A) turned on whether the post-petition income tax liability could be "incurred by the estate" pursuant to 11 U.S.C. 503(b)(1)(B). Pet. App. 37-39. The court explained that Section 503(b)(1)(B)(i) must be read consistently with 26 U.S.C. 1398 and 1399, which establish that a Chapter 12 bankruptcy filing does not create a separate taxable entity for income tax purposes. The bankruptcy court held that, in light of those provisions, "the capital gains tax arising from the postpetition sale of the farm land cannot be a tax 'incurred' by the Chapter 12 Estate under § 503(b)(1)(B)(i)." Pet. App. 44; see *id.* at 42-44. The court observed that its ruling would not render Section 1222(a)(2)(A) superfluous because, "as written, § 1222(a)(2)(A) creates an exception for priority claims arising from the *prepetition* sale, transfer or exchange of farm assets." *Id.* at 45-46.

c. The district court reversed. Pet. App. 18-33. The district court agreed with the conclusion of the bankruptcy court in *In re Dawes*, 382 B.R. 509 (Bankr. D. Kan. 2008), aff'd, 415 B.R. 815 (D. Kan. 2009), rev'd, No. 09-3129, 2011 WL 2450930 (10th Cir. June 21, 2011), petition for cert. pending, No. 11-217 (filed Aug. 17, 2011), which had rejected the government's argument that Section 503(b)(1)(B)(i) requires the existence of a separate taxable estate. Pet. App. 30. The district court also agreed with

the bankruptcy courts in *Knudsen*, *supra*, and in *In re Schilke*, 379 B.R. 899 (Bankr. D. Neb. 2007), aff'd, No. 4:07CV3283, 2008 WL 4224279 (D. Neb. Sept. 9, 2008), aff'd *sub nom. Knudsen* v. *IRS*, 581 F.3d 696 (8th Cir. 2009), both of which had relied in part on legislative history in concluding that 11 U.S.C. 1222(a)(2)(A) applies to post-petition as well as pre-petition taxes. Pet. App. 31-32.

3. The court of appeals reversed the district court's judgment. Pet. App. 1-17. The court explained that, because a Chapter 12 estate is not a separate taxable entity under Sections 1398 and 1399 of the Internal Revenue Code, "a chapter 12 estate cannot incur taxes." *Id.* at 6. The court relied in part on case law reaching the same conclusion for Chapter 13 estates. *Ibid.* The court concluded that "[b]ecause a chapter 12 estate cannot 'incur' a tax," petitioners' post-petition tax liability does not constitute an "administrative expense" within the meaning of Section 503(b), and petitioners therefore "cannot get the benefit of section 1222(a)(2)(A)." *Ibid.*

The court of appeals recognized that its conclusion was contrary to that reached by the Eighth Circuit in *Knudsen* v. *IRS*, 581 F.3d 696 (2009), but the court found the Eighth Circuit's reasoning unpersuasive. Pet. App. 8-13. In particular, the Ninth Circuit disagreed with the Eighth Circuit's refusal to look to the Internal Revenue Code when determining whether a post-petition tax debt was "incurred by the estate." *Id.* at 11-13. The Ninth Circuit noted that the Bankruptcy Code standing alone does not resolve the question whether a Chapter 12 estate can incur taxes, and that "Congress has indicated repeatedly that it is aware that the taxable entity provisions in the Internal Revenue Code are relevant to the Bankruptcy Code." *Id.* at 12.

The court of appeals also noted that petitioners could not avoid the post-petition tax liability simply by including

that liability in their plan, because "the Bankruptcy Code places limits on the liabilities a plan may address." Pet. App. 7-8 n.2. Citing Section 1227 of the Bankruptcy Code, the court explained that a Chapter 12 plan is limited to pre-petition claims. *Ibid.*

Judge Paez dissented. Pet. App. 16-17. Based on his view that Congress intended Section 1222(a)(2)(A) to help family farmers, "regardless of whether they sold the assets before or after filing their Chapter 12 petition," he would have held that petitioners could "treat the capital gains taxes arising from the post-petition sale of their farm assets as an unsecured claim." *Id.* at 16.

SUMMARY OF ARGUMENT

Petitioners' income tax liability arising out of the post-petition sale of farm assets is not subject to 11 U.S.C. 1222(a)(2)(A) and must be collected outside the Chapter 12 bankruptcy proceedings.

A. 1. Consistent with the general structure of the Bankruptcy Code, a Chapter 12 plan is limited to pre-petition debts. Section 1227(a) provides that a Chapter 12 plan binds each "creditor," which the Code defines as the holder of a pre-petition claim. By referring only to "claims" (as opposed to "claims" and "expenses") entitled to priority under Section 507, Section 1222(a)(2) reflects the Code's distinction between pre-petition claims (which are covered by the Chapter 12 plan) and post-petition administrative expenses (which are not). And Section 1226(b)(1) separately provides for (super-priority) payment of administrative expenses outside of the Chapter 12 plan. The extra-plan treatment of post-petition debts in a Chapter 12 case is also consistent with ordinary Chapter 12 practice, in which post-petition income taxes are taken into account

when determining the debtor's disposable income for purposes of plan confirmation, not as part of the plan itself.

2. Because Section 1222(a)(2)(A) provides the debtor relief for a subset of priority claims covered by a Chapter 12 plan, it cannot apply to petitioners' post-petition tax liability, because post-petition debts are not covered by the plan at all. Section 1222(a)(2)(A) does not establish any mechanism to bring into a Chapter 12 plan post-petition debts that would otherwise fall outside the bankruptcy case. Rather, Section 1222(a)(2)(A) provides farmers relief from those tax claims that are otherwise entitled to priority under 11 U.S.C. 507(a)(8), namely pre-petition claims arising from the sale of farm assets.

3. The treatment of post-petition income tax debts under Chapter 13, on which Chapter 12 was modeled, reinforces the conclusion that a Chapter 12 plan does not cover such debts. Section 1305 authorizes governmental bodies to file claims for post-petition tax debts and treats such debts as pre-petition claims. Section 1305 would be unnecessary if a Chapter 13 plan already covered post-petition tax debts. Because Chapter 12 contains no provision analogous to Section 1305, and Chapter 12 and 13 plans are otherwise comparable in scope, the logical inference is that Congress did not intend for post-petition tax debts to be encompassed by a Chapter 12 plan.

B. 1. Even if a Chapter 12 plan encompassed post-petition administrative expenses, Section 1222(a)(2)(A) would not cover the post-petition income tax debt at issue in this case. As relevant here, Section 507(a)(2) encompasses "administrative expenses allowed under section 503(b)." 11 U.S.C. 507(a)(2). Section 503(b)(1)(B), in turn, treats as administrative expenses taxes "incurred by the estate." Because the filing of a Chapter 12 petition does not create

a "separate taxable entity," 26 U.S.C. 1398, 1399, a Chapter 12 estate cannot "incur" federal income taxes.

That result comports with Congress's practical understanding that Chapter 12 (and 13) plans are confirmed relatively quickly, after which property transfers back from the estate to the debtor. Congress appears to have concluded that, because a Chapter 12 estate is unlikely to remain in existence for a prolonged period, it is unnecessary to treat the estate as a separate taxable entity with an obligation to file its own tax return. That conclusion also avoids a conflict between Section 1222(a)(2), which provides for deferred payment of plan claims, and Section 1226(b)(1), which provides for separate up-front payment of administrative expenses.

Contrary to petitioners' assertion (Br. 47), the Internal Revenue Service (IRS) has consistently taken the view that an individual debtor's post-petition income taxes cannot be collected under Chapter 12. The IRS took that position even before the 2005 enactment of Section 1222(a)(2)(A), when treatment of such liabilities as administrative expenses would have facilitated the government's tax-collection efforts. *E.g.*, Internal Revenue Manual (I.R.M. or Manual) 25.17.12.9.3(1) (2004) ("Unlike a Chapter 13 proceeding, no provision exists for filing claims for postpetition taxes in a Chapter 12 bankruptcy.").

2. Although all taxes "incurred by the estate" are incurred post-petition, not all post-petition taxes are "incurred by the estate." Petitioners' reliance on cases involving corporate Chapter 7 and 11 debtors is misplaced because the Internal Revenue Code (26 U.S.C. 6012(b)(3)) requires the bankruptcy trustee in those contexts to make a tax return—thereby incurring tax liability—notwithstanding the lack of a separate taxable entity. The legislative history invoked by petitioners, which consists

largely of a single Senator's statements concerning unenacted bills, does not override the natural interpretation of the various Bankruptcy and Internal Revenue Code provisions that bear on the determination whether the taxes at issue here constitute "administrative expenses."

Since the enactment of the Bankruptcy Code in 1978, Congress has relied on Chapter-specific separate-entity rules to govern the question whether a bankruptcy estate has incurred particular taxes. As enacted in 1978, 11 U.S.C. 346 (1982) addressed, on a Chapter-by-Chapter basis, the question whether income generated during a bankruptcy case is taxable to the estate or to the debtor. Although Section 346 applied only to state and local taxes, Congress subsequently enacted 26 U.S.C. 1398 and 1399 to apply the same approach to federal taxes. The text and history of those provisions make clear that Congress intended them to govern the question whether particular taxes are "incurred by" a bankruptcy estate.

3. It is well established that Chapter 13 estates do not "incur" income taxes, and that such post-petition taxes cannot be collected as administrative expenses in Chapter 13 proceedings. The only relevant difference between Chapter 12 and 13 cases is that Chapter 12 contains no analogue to Section 1305, which authorizes governmental entities to file proofs of claim for post-petition taxes. The absence of any such provision in Chapter 12 reinforces the conclusion that post-petition income taxes in Chapter 12 cases must be collected outside the bankruptcy plan.

ARGUMENT

11 U.S.C. 1222(a)(2)(A) IS INAPPLICABLE TO INCOME TAX OBLIGATIONS ARISING FROM THE POST-PETITION SALE OF FARM ASSETS

For two independent reasons, the post-petition income tax liability at issue here is not subject to 11 U.S.C. 1222(a)(2)(A) and must be collected outside the Chapter 12 bankruptcy proceedings. *First*, consistent with the structure of Chapter 12 (and Chapter 13, on which Chapter 12 is modeled), a Chapter 12 plan is limited to pre-petition claims and does not cover post-petition debts. Because Section 1222(a)(2)(A) simply provides for special treatment of a subset of priority claims covered by a Chapter 12 plan, it cannot apply to petitioners' post-petition tax liability.

Second, even if a Chapter 12 plan encompassed post-petition administrative expenses, it would not encompass the tax liability at issue here. Petitioners contend that the relevant taxes qualify as "administrative expenses" because they were "incurred by the estate." The Chapter 12 estate of an individual cannot incur federal income taxes, however, because it is not a separate taxable entity.

A. A Chapter 12 Plan Is Limited To Pre-Petition Claims

Chapter 12 of the Bankruptcy Code was enacted in 1986 to "offer[] family farmers the important protection from creditors that bankruptcy provides while, at the same time, preventing abuse of the system and ensuring that farm lenders receive a fair payment." H.R. Conf. Rep. No. 958, 99th Cong., 2d Sess. 48 (1986) (*1986 Conference Report*); see Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 255, 100 Stat. 3105. As a general matter, "bankruptcy proceedings do not address postpetition claims: 'The basic scheme of the Bankruptcy Code is to affect claims arising

prior to the filing of the petition under title 11.'" *In re Ripley*, 926 F.2d 440, 443 (5th Cir. 1991) (quoting 5 *Collier on Bankruptcy* ¶ 1305.01[1], at 1305-2 (Lawrence P. King ed., 15th ed. 1988)) (Chapter 13 case); cf. 11 U.S.C. 727(b) (limiting Chapter 7 discharge to "debts that arose before the date of the order for relief").[3] Chapter 12 is consistent with that basic scheme.

1. Chapter 12 distinguishes between pre-petition claims and post-petition liabilities

a. As set forth in Section 1222, a Chapter 12 plan provides for the payment—in full or in part—of certain claims against the debtor. After a Chapter 12 plan is confirmed (11 U.S.C. 1225) and the debtor completes all payments thereunder, "the court shall grant the debtor a discharge of all debts provided for by the plan," except for specified debts not at issue here. 11 U.S.C. 1228(a).

A Chapter 12 plan and the ultimate discharge order generally are limited to claims incurred before the filing of the bankruptcy petition. "[T]he provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor." 11 U.S.C. 1227(a); compare 11 U.S.C. 501(a) (stating that a "creditor" may file a "proof of claim"), with 11 U.S.C. 503(a) (stating that an "entity" may file "a request for payment of an administrative expense"). The Bankruptcy Code defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor," 11 U.S.C. 101(10)(A), *i.e.*, a holder of a

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[3] Chapter 11 establishes a different demarcation date by providing that the plan and resulting discharge cover debts that "arose before the date of [plan] confirmation," 11 U.S.C. 1141(d)(1)(A), rather than limiting discharge to debts that arose before the bankruptcy petition was filed.

pre-petition claim.[4] See note 1, *supra*; see also 11 U.S.C. 502(b) (requiring the court to determine the amount of a claim "as of the date of the filing of the petition"). A Chapter 12 plan thus does not bind holders of post-petition liabilities because they are not "creditors." See Pet. App. 7a n.2; cf. *Holywell Corp.* v. *Smith*, 503 U.S. 47, 58-59 (1992) ("Even if § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, we do not see how it can bind the United States or any other creditor with respect to post-confirmation claims. Cf. 11 U.S.C. § 101(10) (1988 ed., Supp. II) (defining 'creditor' as used in § 1141(a) as an entity with various kinds of pre-confirmation claims).").[5]

b. Chapter 12's distinction between pre-petition and post-petition debts is reflected in Section 1222(a)(2) itself. As described above (pp. 2-3, *supra*), Section 1222(a)(2) provides for the full payment under a Chapter 12 plan of "claims entitled to priority under section 507." 11 U.S.C. 1222(a)(2). Section 507(a), however, addresses both "expenses and claims." Section 507(a) enumerates nine categories of "claims," all of which arise pre-petition. 11 U.S.C. 507(a)(1) and (3)-(10). It also includes one category of "expenses"—allowable "administrative expenses," 11 U.S.C. 507(a)(2)—such as fees for services rendered to the estate,

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[4] Although the term "creditor" also includes holders of the post-petition obligations specified in 11 U.S.C. 101(10)(B), the Code explicitly treats those obligations "as if [they] had arisen before the date of the filing of the petition," *i.e.*, as pre-petition claims. 11 U.S.C. 502(f), (g), (h) and (i); see 11 U.S.C. 348(d). In any event, the post-petition income tax liability at issue in this case does not fall within any of those exceptions.

[5] As noted above (note 3, *supra*), unlike for other Chapters, the key dividing line for dischargeable claims in a Chapter 11 plan is the time of plan confirmation, not filing of the bankruptcy petition.

11 U.S.C. 503(b)(1)(A) and (2), all of which necessarily arise post-petition. The reference in Section 1222(a)(2) to "claims" under Section 507, rather than to "expenses and claims" under Section 507, is thus consistent with the understanding that a Chapter 12 plan is limited to pre-petition debts.

"The dual reference to 'expenses and claims' appears to be no accident, given that the language constitutes a significant change in language from that used in the former Bankruptcy Act." Sidney Levinson, *Does an Administrative Expense Constitute a "Claim"*, 25 Cal. Bankr. J. 389, 392 (2000); see S. Rep. No. 1106, 95th Cong., 2d Sess. 20 (1978) ("The committee amendments contain several changes designed to clarify the distinction between a 'claim' (which generally relates to a debt incurred before the bankruptcy petition is filed) and an administrative expense (which is an expense incurred by the trustee after the filing of the petition)."). To be sure, Congress has not rigorously adhered to that terminological distinction, since some Bankruptcy Code provisions refer to administrative expenses as "claims." See Pet. Br. 13-15 (citing, *e.g.*, 11 U.S.C. 726(b), 1123(a)(1), 1129(a)(9)(A), 1226(b)(1), 1326(b)(1)). Each of the provisions cited by petitioners, however, refers to "claims" of the "kind specified in" Section 507(a)(2), thus making clear Congress's intent to cover administrative expenses. By contrast, Section 1222(a)(2)'s use of the term "claim" without cross-reference to Section 507(a)(2) is best understood to reflect the general rule that "claims" do not include post-petition liabilities. See *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (recognizing that same "words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent"); cf. *Dewsnup* v. *Timm*, 502 U.S. 410, 417

(1992) (rejecting argument that "the words 'allowed secured claim' must take the same meaning in [Bankruptcy Code] § 506(d) as in § 506(a)").

c. Chapter 12 provides an alternative mechanism, outside the four corners of the plan itself, for payment of post-petition administrative expenses. Section 1226(b)(1) states that "[b]efore or at the time of each payment to creditors under the plan, there shall be paid * * * any unpaid claim of the kind specified in section 507(a)(2)," *i.e.*, administrative expenses allowed under Section 503(b). 11 U.S.C. 1226(b)(1). As a result, plan payments to pre-petition creditors must cease until administrative expenses are paid. Section 1226(b)(1) thus assures that the holders of certain post-petition debts—including fees accrued for services rendered to the estate, see 11 U.S.C. 503(b)(1)(A) and (2)—are paid in full through the bankruptcy proceedings.

That assurance of full payment provides an important incentive for third parties to do business with a debtor and provide necessary services in furtherance of the bankruptcy case. See, *e.g.*, *In re Ybarra*, 424 F.3d 1018, 1026 (9th Cir. 2005) ("The purpose of administrative priority status is to encourage third parties to contract with the bankruptcy estate for the benefit of the estate as a whole."), cert. denied, 547 U.S. 1163 (2006). By contrast, post-petition debts that do not qualify as allowable "administrative expenses"—*e.g.*, a Chapter 12 debtor's post-petition consumer debt—must be collected not only outside the Chapter 12 plan, but outside the bankruptcy proceedings altogether. See *Ripley*, 926 F.2d at 443 ("When [a post-petition] claim arises, the entity possessing it usually will seek satisfaction of the debt outside of the bankruptcy proceedings."). Section 1226(b)(1)'s special treatment of "administrative expenses" thus reinforces the general rule that post-

petition debts are neither collectible nor dischargeable in a bankruptcy case.

Acceptance of petitioners' position would create a conflict between Sections 1222(a)(2) and 1226(b)(1). By providing that the administrative expenses of a Chapter 12 estate must be paid "[b]efore or at the time of each payment to creditors under the plan," Section 1226(b)(1) confers on such expenses a sort of super-priority status. Section 1222, by contrast, generally requires deferred payment (without interest) of priority claims over the three-to-five year term of the plan. 11 U.S.C. 1222(a)(2) and (c). By limiting Section 1222(a)(2) to "claims entitled to priority under section 507" (rather than "claims *and expenses* entitled to priority under section 507"), Congress avoided giving conflicting directives with respect to the payment of administrative expenses in Chapter 12 proceedings. Congress's separate provision for administrative expenses in Chapter 12 cases reinforces the inference that the omission of any reference to "expenses" in Section 1222(a)(2) was a deliberate wording choice.

The conflict between the two provisions would be particularly severe in cases, like this one, that involve debts owed to governmental units arising from the sale of farm assets. Section 1226(b)(1)'s super-priority rule for administrative expenses contains no exception for debts of that character. Debts subject to Section 1222(a)(2)(A)'s priority-stripping effect, by contrast, are not simply subject to deferred payment but are treated as unsecured claims. If petitioners' post-petition tax debt is held (as petitioners urge) to be a claim for administrative expenses covered by Section 507(a)(2), then Section 1222(a)(2)(A) allows it to be treated as an unsecured non-priority claim (thereby rendering it dischargeable after less than full payment), while Section 1226(b)(1) requires it to be paid at or before the time pay-

ments are made to other creditors. If properly confined to pre-petition liabilities, by contrast, Section 1222(a)(2)(A) creates no such conflict, since pre-petition debts cannot qualify as administrative expenses.

d. Established Chapter 12 practices reflect the understanding that post-petition income taxes remain the personal obligation of the debtor, to be collected outside the bankruptcy framework. A Chapter 12 debtor's post-petition income taxes are typically addressed through 11 U.S.C. 521 (2006 & Supp. III 2009), entitled "Debtor's duties," which obligates a debtor to file schedules of current income and current expenditures with the bankruptcy petition. 11 U.S.C. 521(a)(1)(B); see Fed. R. Bankr. P. 1007(b) and (c); Official Bankr. Form 6, Sched. I (Current Income of Individual Debtor(s)), Sched. J (Current Expenditures of Individual Debtor(s)). A debtor lists on those schedules his projected income and projected expenses, including his projected tax obligations. See *id.* Sched. I (line 4a), Sched. J (line 12). Those schedules allow the court to determine whether a debtor will have sufficient disposable income, after expenses, to execute the proposed plan. See 11 U.S.C. 1222(a)(1), 1225(b)(1)(B) and (2); cf. *Ransom* v. *FIA Card Servs., N.A.*, 131 S. Ct. 716, 721-722 (2011) (discussing "disposable income" under the analogous Chapter 13 provisions, 11 U.S.C. 1325(b)(1)(B) and (2)). The debtor's actual and anticipated post-petition taxes thus are among the expenses the bankruptcy court considers in determining whether a Chapter 12 plan should be confirmed, but their payment is not provided for by the plan itself.

2. Section 1222(a)(2)(A) does not bring post-petition debts within the ambit of a Chapter 12 plan

a. Before BAPCPA was enacted, Section 1222(a)(2) required the debtor to submit a reorganization plan that

provided for the full payment, in deferred cash payments, of all "claims entitled to priority under section 507." 11 U.S.C. 1222(a)(2) (2000). As amended by BAPCPA, Section 1222(a)(2) states that the plan shall provide:

> for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—
>
> (A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge.

11 U.S.C. 1222(a)(2)(A). Under the newly added subsection (A), a governmental claim that arises from the disposition of a farm asset and that otherwise qualifies for priority status under 11 U.S.C. 507 is treated as a general unsecured claim under a Chapter 12 plan. BAPCPA thus created a limited exception to the general rule that a Chapter 12 plan must provide for full payment of all priority claims. Section 1222(a)(2)(A) does not alter the established distinction between pre-petition and post-petition debts, however, nor does it bring within a Chapter 12 plan or case any debts that otherwise would be subject to collection outside the bankruptcy framework.

b. Section 1222(a)(2)(A) provides meaningful relief to debtors, even though it does not encompass post-petition tax liabilities, because it "creates an exception for priority claims arising from the *prepetition* sale, transfer or exchange of farm assets." Pet. App. 45-46. Petitioners argue that limiting Section 1222(a)(2)(A) to pre-petition tax claims "ascribe[s] an unlikely intent to Congress." Pet. Br. 28. They observe (*id.* at 28-32) that BAPCPA amended Section

507(a)(8), which provides for priority treatment of specified tax claims, to limit it to taxes on income "for a taxable year ending on or before the date of the filing of the petition." 11 U.S.C. 507(a)(8)(A). Consistent with the IRS's preexisting position that income taxes are incurred only on the last day of the taxable year, that amendment made clear that Section 507(a)(8) does not confer priority status on claims for taxes on income earned at an earlier time within the same taxable year in which a bankruptcy petition was filed. See *United States* v. *Hillsborough Holdings Corp.*, 116 F.3d 1391, 1394 (11th Cir. 1997); BAPCPA § 705(1)(A), 119 Stat. 126 (amending 11 U.S.C. 507(a)(8)).

The practical effect of current Section 507(a)(8) is to make the range of tax debts that are entitled to priority treatment somewhat smaller than it might otherwise be. But since Section 1222(a)(2) refers specifically to "claims entitled to priority under section 507," 11 U.S.C. 1222(a)(2), Congress evidently intended to incorporate the priority rules established by the various provisions of Section 507. If it is otherwise appropriate to construe Section 1222(a)(2) as incorporating the established distinction between pre- and post-petition liabilities, Congress's specification (in the BAPCPA amendment to Section 507(a)(8)) of the line between pre- and post-petition tax debts provides no basis for departing from that approach.

As this Court recently stated with respect to a different aspect of BAPCPA, the Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Hamilton* v. *Lanning*, 130 S. Ct. 2464, 2473 (2010) (quoting *Travelers Cas. & Sur. Co.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 454 (2007)). In rejecting the contention that Section 1222(a)(2)(A) authorizes discharge (after partial payment) of post-petition tax debts, the Tenth Circuit observed

that "Congress, while intent on providing special tax relief to farmers, may not have seen fit to undertake such a large rewriting of the bankruptcy or tax codes in service of that mission—especially when *pre*-petition income tax relief could be provided surgically with the simple addition of § 1222(a)(2)(A)." *In re Dawes*, No. 09-3129, 2011 WL 2450930, at *6 (June 21, 2011), petition for cert. pending, No. 11-217 (filed Aug. 17, 2011); see *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice —and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

3. The Chapter 13 framework indicates that a Chapter 12 plan does not cover post-petition tax liabilities

The view that petitioners' post-petition tax liabilities are outside a Chapter 12 plan, and thus beyond the reach of Section 1222(a)(2)(A), is reinforced by the longer established Chapter 13 framework. Chapter 12 was modeled on Chapter 13, which addresses "Adjustment of Debts of an Individual with Regular Income" (other than family farmers). See *1986 Conference Report* 48 ("This new chapter is modeled closely after existing chapter 13."); 8 *Collier on Bankruptcy* ¶ 1200.01[5], at 1200-8 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. July 2010) ("Chapter 12 was modeled after chapter 13 and the overall structure of the two chapters is similar."); see also, *e.g.*, *Pelofsky* v. *Wallace*, 102 F.3d 350, 351 n.2 (8th Cir. 1996); *In re White*, 25 F.3d 931, 933 (10th Cir. 1994); *In re Kerwin*, 996 F.2d 552, 559 (2d Cir. 1993).

Chapter 13 authorizes the filing of a proof of claim for "taxes that become payable to a governmental unit while the case is pending." 11 U.S.C. 1305(a)(1). Such a claim is treated under the plan "the same as if such claim had arisen before the date of the filing of the petition." 11 U.S.C. 1305(b). Section 1305 would be unnecessary if Section 1322(a)(2)—which states, in language parallel to that of Section 1222(a)(2), that "[t]he plan shall * * * provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507," 11 U.S.C. 1322(a)(2)—already provided for priority treatment of post-petition tax debts. The perceived need for Section 1305 to allow post-petition tax claims to be asserted in Chapter 13 cases, combined with the absence of any comparable provision in Chapter 12, reinforces the conclusion that post-petition tax liabilities fall outside a Chapter 12 plan.

B. Post-Petition Income Taxes Of An Individual Chapter 12 Debtor Do Not Qualify As "Administrative Expenses" Because They Are Not "Incurred By The Estate"

As explained above, Section 1222(a)(2)(A) does not encompass the post-petition tax liabilities at issue in this case because a Chapter 12 plan is limited to pre-petition debts. But even if some post-petition administrative expenses could be included in a Chapter 12 plan, Section 1222(a)(2)(A) would be inapplicable here. Petitioners rely on Bankruptcy Code provisions that give priority status to "administrative expenses" under various circumstances. The post-petition income tax debts of individual Chapter 12 debtors, however, are not "administrative expenses" under the applicable Bankruptcy and Internal Revenue Code provisions.

1. Reading the Bankruptcy and Internal Revenue Codes together precludes treating post-petition income taxes as "administrative expenses" of an individual debtor's Chapter 12 estate

a. By its terms, Section 1222(a)(2)(A) applies only to governmental claims that otherwise qualify for priority treatment under Section 507. Of the ten categories of expenses and claims that are entitled to priority status under Section 507, two address taxes: (i) claims for certain pre-petition taxes (11 U.S.C. 507(a)(8)), and (ii) allowable administrative expenses (11 U.S.C. 507(a)(2)), which include in certain cases post-petition taxes. Section 507(a)(8) does not apply here because the tax at issue in this case arises out of a sale of land that occurred *after* the Chapter 12 petition was filed. Section 507(a)(2) confers priority status on "administrative expenses allowed under section 503(b)," 11 U.S.C. 507(a)(2), and Section 503(b)(1)(B) identifies as allowable administrative expenses "any tax * * * incurred by the estate, * * * except a tax of a kind specified in section 507(a)(8) [pre-petition taxes]." 11 U.S.C. 503(b)(1)(B)(ii). Thus, even if the phrase "claims entitled to priority under section 507" in Section 1222(a)(2) encompassed administrative expenses under Section 503(b), petitioners' income tax debt could qualify only if it was "incurred by the estate."

The determination whether an income tax is "incurred by the estate" (11 U.S.C. 503(b)(1)(B)(i)) depends in part on the nature of the debtor and on the chapter of the Bankruptcy Code under which relief is sought. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 277 (1977) (*1977 House Report*). Under the Internal Revenue Code provision that governs federal income taxes, a bankruptcy filing does not create a "separate taxable entity," 26 U.S.C. 1399, except in the case of an individual debtor who files for Chapter 7 or

Chapter 11 bankruptcy protection, see 26 U.S.C. 1398. See p. 4, *supra*. Because a Chapter 12 estate is not a "separate taxable entity," it cannot incur federal income taxes. Nor, as petitioners acknowledge (Br. 53), does the trustee of an individual's Chapter 12 estate have a duty to file a tax return. Because "[t]he Internal Revenue Code ties the duty to pay federal income taxes to the duty to make an income tax return," *Holywell Corp.*, 503 U.S. at 52, the absence of a filing obligation reinforces the conclusion that the estate of an individual Chapter 12 debtor does not incur federal income-tax liability. See *In re Dawes*, 2011 WL 2450930, at *3 ("Only the debtor, not the estate, is *liable* for the payment of these taxes," and thus "the estate does not *incur* such taxes."). Because the post-petition taxes arising out of petitioners' sale of assets were not "incurred by the estate," they do not qualify as "administrative expenses." Pet. App. 5-6.

In explaining Congress's decision not to treat Chapter 13 estates as separate taxable entities, the 1977 House Report explained that "most chapter 13 estates will only remain open for 1 or 2 months until confirmation of the plan at which time section 1327(b) of Title 11 will almost always revest title to property of the estate in the debtor." *1977 House Report* 276. Because the "discharge normally occurs only after completion of all payments under the plan which can be expected to be 2 or 3 years after the commencement of the [Chapter 13] case[,] * * * the debtor does not get an immediate fresh start." *Ibid.* In addition, "a Chapter 13 trustee has a limited role in administering the estate, and is precluded from operating any business of the debtor." *Id.* at 277. Accordingly, the House Report concluded, "there is no reason to impose a duty to pay taxes on the trustee." *Ibid.* The same is true for Chapter 12 estates. See *Dawes*, 2011 WL 2450930, at *3 ("[B]ecause Chapter 12

and 13 cases are typically confirmed quickly (at least compared to bankruptcies under Chapters 7 and 11), the expectation is that the debtor's post-petition earnings and taxes will meet up in his hands soon enough.").[6]

b. Well before the 2005 BAPCPA amendments that added Section 1222(a)(2)(A) to the Bankruptcy Code, the IRS had recognized that it could not collect post-petition income-tax liabilities from an individual debtor within the framework of a Chapter 12 plan. That longstanding position reinforces the conclusion that such taxes are not "administrative expenses" of a Chapter 12 estate.

Before BAPCPA was enacted, it would have served the government's tax-collection interests to characterize the post-petition income-tax liabilities of an individual Chapter 12 debtor as administrative expenses entitled to priority under Section 507(a)(2). That interpretation would have entitled the government to full payment of such taxes either "[b]efore or at the time of each [plan] payment" pursuant to Section 1226(b)(1), or (under petitioners' view) through the Chapter 12 plan pursuant to pre-BAPCPA Section 1222(a)(2). At least as early as 1998, however, the IRS took the position that the statutory scheme did not permit such a result: "Unlike a Chapter 13 proceeding, no provision exists for filing claims for postpetition taxes in a Chapter 12

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[6] The court in *Dawes* further explained:

> The rationale for allocating tax liability like this in Chapter 12 and 13 bankruptcies appears to be a pragmatic one. Upon confirmation of a plan under those chapters, the estate property, including any post-petition income, joins the post-petition income taxes back in the hands of the debtor. Disregarding the temporary existence of a bankruptcy estate for purposes of tax liability tidies the accounting somewhat, because there's only a single return—the debtor's—that needs to be filed and kept track of.

2011 WL 2450930, at *3 (citations omitted).

bankruptcy." I.R.M. 25.17.12.9.3 (2004); see I.R.M. 25.17.12.9.3(1) (2002) ("There is no provision for filing claims for postpetition taxes in a Chapter 12 bankruptcy as there is in a Chapter 13 proceeding."); I.R.M. 5.9.10.8(4) (1998) ("*[T]here is no provision for post-petition claims* as in a Chapter 13 proceeding."); cf. I.R.M. 57(13)6.2(5) (1988) ("If the debtor incurs post-petition liabilities, [the government] may proceed with collection outside the plan to the extent there are assets not subject to the automatic stay."). The IRS has adhered to that position since—including in the current, post-BAPCPA version of the Manual provision. See I.R.M. 5.9.9.9.3 (2006) ("Unlike a Chapter 13 proceeding, no provision exists for filing claims for postpetition taxes of a debtor who is an individual in a Chapter 12 bankruptcy.").

The IRS's consistent position on Chapter 12's treatment of an individual debtor's post-petition income taxes—even when that position was to the government's detriment—disproves petitioners' contention (Br. 47) that the government has "changed its historical position" in light of BAPCPA's enactment of Section 1222(a)(2)(A). Petitioners assert that "[u]ntil the enactment of Section 1222(a)(2)(A), the IRS did not contest the principle that taxes incurred during bankruptcy estate administration have administrative expense priority." *Ibid.* As the Manual provisions cited above demonstrate, that assertion is not an accurate characterization of the IRS's historical position with respect to Chapter 12.[7]

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[7] The provisions of the Internal Revenue Manual "do not have the force and effect of law," but rather "only govern the internal affairs of the Internal Revenue Service." *Valen Mfg. Co.* v. *United States*, 90 F.3d 1190, 1194 (6th Cir. 1996) (internal quotation marks and citation omitted). The Manual provisions cited above, however, demonstrate the IRS's consistent practice and refute petitioners' contention.

The cases and materials on which petitioners rely (Br. 48) deal with corporate Chapter 7 or 11 debtors.[8] Unlike the estate of an individual Chapter 12 or 13 debtor, the estate of a corporate Chapter 7 or 11 debtor can be liable for post-petition federal income taxes even though it is not a "separate taxable entity." Section 6012(b)(3) of the Internal Revenue Code requires a corporation's bankruptcy trustee to file the debtor corporation's federal income tax returns. 26 U.S.C. 6012(b)(3); see 11 U.S.C. 704(a)(8), 1106(a)(1). As explained above (p. 23, *supra*), that duty to file the tax return causes the estate of a Chapter 7 or 11 corporate debtor to be liable for, or "incur," such taxes.[9] See 26 U.S.C. 6151(a) ("the person required to make [the tax] return shall * * * pay such tax"); *Holywell Corp.*, 503 U.S. at 52; see also *Dawes*, 2011 WL 2450930, at *3 (distinguishing corporate Chapter 7 and 11 debtors from individual Chapter 12 debtors such as petitioners). The sources on which petition-

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[8] See *United States* v. *Noland*, 517 U.S. 535, 536-537 (1996) (corporate Chapter 11 debtor); *Holywell Corp.*, *supra* (corporate Chapter 11 debtor); *In re Calore Express Co.*, 288 F.3d 22, 28 (1st Cir. 2002) (corporate Chapter 11 debtor); *Hillsborough Holdings Corp.*, 116 F.3d at 1392-1393 (corporate Chapter 11 debtor); *In re Pacific-Atl. Trading Co.*, 64 F.3d 1292 (9th Cir. 1995) (Chapter 7 corporate debtor); *In re Preferred Door Co.*, 990 F.2d 547, 548 (10th Cir. 1993) (corporate Chapter 11 debtor); *In re Flo-Lizer, Inc.*, 916 F.2d 363, 364 (6th Cir. 1990) (corporate Chapter 11 debtor); *In re Allied Mech. Servs., Inc.*, 885 F.2d 837, 837 (11th Cir. 1989) (corporate Chapter 11 debtor); IRS Chief Couns. Advice No. 200235024 (Aug. 30, 2002), 2002 WL 1999525 (corporate Chapter 11 debtor).

[9] For that reason, the estate of a corporate (as opposed to individual) Chapter 12 debtor—whose trustee must also file the debtor corporation's federal income tax returns pursuant to 26 U.S.C. 6012(b)(3); see 11 U.S.C. 1203—could be viewed as incurring post-petition income taxes. Such taxes would be collectible as administrative expenses pursuant to Section 1226(b)(1), rather than outside the bankruptcy case as required for an individual Chapter 12 debtor.

ers rely are thus inapposite in this case, which involves individual Chapter 12 debtors.

Petitioners' reliance (Br. 49) on IRS Chief Couns. Advice No. 200518002 (May 6, 2005), 2005 WL 1060956, is also misplaced.[10] That advice states that "the Service has strong support for continuing to contend that its administrative expense claim in a Chapter 12 case must be paid in full before other creditors with lower priority begin receiving payments." *Id.* at 5, 2005 WL 1060956 at *4. That statement primarily reflects the government's understanding that administrative expenses, pursuant to Section 1226(b)(1), are treated separately from other claims in a Chapter 12 plan. See *ibid.* To be sure, the advice implicitly assumes that at least *some* post-petition taxes will qualify as administrative expenses in Chapter 12 cases. But the advice does not specify *which* taxes should be treated as administrative expenses, and it does not suggest that the post-petition income taxes of an individual Chapter 12 debtor fall within that category. As explained above (see note 9, *supra*), the post-petition income taxes of a *corporate* Chapter 12 debtor could be treated as administrative expenses. The Bankruptcy Code and its legislative history also support the view that post-petition *employment* taxes can be treated as administrative expenses.[11] Cf. Pet. Br. 49 (erroneously sug-

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[10] We note that, pursuant to 26 U.S.C. 6110(k)(3), Chief Counsel advice prepared by the IRS Office of Chief Counsel may not be used or cited a precedent. See 26 U.S.C. 6110(b)(1)(A) (defining "written determination"); 26 U.S.C. 6110(i)(1) (defining "Chief Counsel advice"). Nor does it constitute an official ruling or position of the IRS. I.R.M. 33.1.2.2.3.4(1) (2004).

[11] See 11 U.S.C. 503(b)(1)(A)(i) (including as administrative expenses "wages, salaries, and commissions for services rendered after the commencement of the case"); S. Rep. No. 989, 95th Cong., 2d Sess. 66 (1978) ("The actual, necessary costs and expenses of preserving the estate,

gesting that *In re Ryan*, 228 B.R. 746 (Bankr. D. Or. 1999), a Chapter 12 case treating post-petition employment taxes as administrative expenses, involved capital gains taxes).

2. *Petitioners' interpretation of the phrase "incurred by the estate" ignores the Internal Revenue Code and conflicts with other provisions of the Bankruptcy Code*

Petitioners' argument ultimately depends on the proposition that the phrase "incurred by the estate" means simply "incurred post-petition." That reading ignores the relevant Internal Revenue Code provisions, however, and it creates other anomalies within the Bankruptcy Code.

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including wages, salaries, or commissions for services rendered after the order for relief, and any taxes on, measured by, or withheld from such wages, salaries, or commissions, are allowable as administrative expenses."). In addition, the "separate taxable entity" rules of 26 U.S.C. 1398 and 1399 apply only to federal income taxes, not employment taxes. See S. Rep. No. 1035, 96th Cong., 2d Sess. 4 (1980) ("The bill [that became Section 1398] treats the bankruptcy estate of an individual in a liquidation or reorganization case under the new bankruptcy statute as a separate taxable entity for Federal income tax purposes."). Indeed, Sections 1398 and 1399 are located in Subtitle A of the Internal Revenue Code (26 U.S.C. 1-1563), which governs income taxes, while employment taxes are the subject of Subtitle C (26 U.S.C. 3101-3510).

If treated as administrative expenses, the employment taxes of a Chapter 12 debtor would be governed by Section 1226(b)(1) rather than by Section 1222(a)(2). Employment taxes, the greater portion of which are trust fund taxes withheld from employee wages (26 U.S.C. 3102(a), 3402(a), 7501(a)), ordinarily must be paid when wages are paid. Application of Section 1226(b)(1) ensures that such taxes are paid "[b]efore or at the time of each payment to creditors under the plan" (11 U.S.C. 1226(b)) rather than "in deferred cash payments" (11 U.S.C. 1222(a)(2)) over the life of a multi-year plan. Cf. pp. 15-16, *supra*.

a. Not every tax incurred after the filing of the bankruptcy petition is "incurred by the estate"

Petitioners assert that the determination whether a particular tax qualifies as an administrative expense "turn[s] on whether the tax was incurred after commencement of the bankruptcy case." Pet. Br. 22; see *id.* at 10-33. That argument is unsound. To be sure, all taxes "incurred by the estate" under Section 503(b) are incurred post-petition, since no bankruptcy estate exists until the petition is filed. As the court of appeals explained, however, "although all taxes 'incurred by the estate' are 'incurred post-petition,' not all 'taxes incurred post-petition' are 'incurred by the estate.'" Pet. App. 10; see *Dawes*, 2011 WL 2450930, at *4 ("The fact that a bankruptcy estate can't incur liabilities until it comes into existence doesn't mean *every* liability that arises after a petition is filed is automatically incurred by the estate and becomes its liability.").

Petitioners invoke, *inter alia*, this Court's decision in *United States* v. *Noland*, 517 U.S. 535 (1996); snippets of legislative history; and a provision of the Internal Revenue Code (26 U.S.C. 6658) other than Sections 1398 and 1399. Pet. Br. 15-28. None of those materials provides a sound basis for disregarding the most natural interpretation of the Bankruptcy and Internal Revenue Code provisions discussed above.

i. Petitioners rely (Br. 15-17) on this Court's statement in *Noland* that the government's claim for a post-petition tax penalty qualified as an "administrative expense" under 11 U.S.C. 503(b)(1)(C). See 517 U.S. at 541, 543. The penalty at issue in *Noland*, however, stemmed not from income taxes, but rather from non-payment of employment taxes. See *In re First Truck Lines, Inc.*, 48 F.3d 210, 211 (6th Cir. 1995) ("During the postpetition operation of its business, the debtor-in-possession did not pay to the Internal Reve-

nue Service accrued Federal Insurance Contributions Act and Federal Unemployment Tax Act taxes."), rev'd *sub nom. Noland*, *supra*. That distinction bears directly on the question whether particular tax liabilities are treated as administrative expenses. See p. 27 & note 11, *supra*. In addition, *Noland* involved a corporate Chapter 11 (and eventually Chapter 7) debtor (see 517 U.S. at 536-537), and corporate Chapter 7 and 11 bankruptcy trustees are responsible for post-petition income taxes even though the estate in those cases is not a "separate taxable entity." See p. 26, *supra*. Petitioners' reliance (Br. 17) on *Nicholas* v. *United States*, 384 U.S. 678 (1986), which involved a corporate debtor under Chapter XI of the predecessor Bankruptcy Act (*id.* at 679), is misplaced for the same reason.

ii. Petitioners primarily rely on two sets of legislative history materials. The first consists of committee reports accompanying the Bankruptcy Reform Act of 1978 (1978 Act), Pub. L. No. 95-598, 92 Stat. 2549, which enacted the current Bankruptcy Code (including 11 U.S.C. 503 and 507). Petitioners cite (Br. 20) the Senate Report's statement that "[i]n general, administrative expenses include taxes which the trustee incurs in administrating the debtor's estate, including taxes on capital gains from sales of property by the trustee and taxes on income earned by the estate during the case." S. Rep. No. 989, 95th Cong., 2d Sess. 66 (1978). The Tenth Circuit aptly observed that "as legislative history goes this is no smoking gun." *Dawes*, 2011 WL 2450930, at *7. The Senate Report was issued two years before the enactment of 26 U.S.C. 1398 and 1399, which establish that a Chapter 12 estate is not a "separate taxable entity." In any event, the quoted excerpt simply describes the proper treatment of taxes "which the trustee incurs"; it does not discuss the analysis that should be used

to determine whether a particular tax is incurred by the trustee or by the debtor. See Pet. App. 15.

Petitioner's reliance (Br. 19) on a statement in the parallel House Report—that "[t]axes arising from the operation of the estate after bankruptcy are entitled to priority as administrative expenses," *1977 House Report* 193—is similarly misplaced. That general statement does not purport to address all types of bankruptcies or taxes, let alone to resolve the question whether income taxes arising from a Chapter 12 debtor's post-petition sale of farm assets "aris[e] from operation of the estate." Indeed, the *1977 House Report* also explains that the bankruptcy estate sometimes may "not [be] a separate taxable entity"; that in some cases "any income * * * is to be taxed only to the debtor"; and that "[t]he duration of a chapter 13 case is so short that there is no reason to impose a duty to pay taxes on the trustee." *Id.* at 277.

Petitioners also rely on various statements by a single Senator about unenacted predecessor bills that contained language identical to current 11 U.S.C. 1222(a)(2)(A). See Pet. Br. 23-26 (citing four floor statements, one letter, and one written hearing statement by Senator Grassley from 1999-2001 concerning unenacted precursor bills). Those statements reflect Senator Grassley's concern about farmers' tax liabilities in bankruptcy and his desire to reduce the priority, in Chapter 12 cases, of income tax liabilities arising from the sale of farm assets. For several reasons, however, petitioners' reliance on those statements is unavailing. See Pet. App. 14-16.

First, recourse to legislative history is unwarranted because the Bankruptcy Code provisions at issue here are not ambiguous when read together with the pertinent provisions of the Internal Revenue Code. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

Second, floor statements are a particularly unreliable form of legislative history. *Ibid.* Third, comments regarding unenacted bills offer little insight into the intent of the subsequent Congress that actually enacted Section 1222(a)(2)(A). See *Massachusetts* v. *EPA*, 549 U.S. 497, 529-530 (2007) (explaining that views of one Congress ordinarily should not be attributed to another); *Doe* v. *Chao*, 540 U.S. 614, 620-622 (2004).

Finally, and perhaps most significantly, Senator Grassley's statements "don't speak directly to the question whether post-petition income taxes qualify as administrative expenses under [11 U.S.C.] 503(b)." *Dawes*, 2011 WL 2450930, at *7. Section 1222(a)(2)(A) strips priority from certain claims for which the government would otherwise be entitled to full payment under the Chapter 12 plan. The dispute between the parties in this case concerns the antecedent question whether, if Section 1222(a)(2)(A) had never been enacted, petitioners' post-petition tax debts could have been collected within the bankruptcy case. The resolution of that question turns on *other* Bankruptcy and Internal Revenue Code provisions that were enacted many years before Senator Grassley made the statements on which petitioners rely. Those statements could not "have influenced or reflected the intent of the 1978 Congress that enacted [11 U.S.C.] 503(b)," *ibid.*, nor could they have informed the understanding of the 1980 Congress that enacted 26 U.S.C. 1398 and 1399, see Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 3(a)(1), 94 Stat. 3397.

Petitioners assert that "[t]he whole point of [Section 1222(a)(2)(A)] was to enable family farmers to confirm plans that would downsize their farm assets, pay their creditors with sale proceeds, and be discharged from the tax liability arising from the sale." Pet. Br. 59. That broad-brush characterization, however, ignores the finely reticu-

lated statutory framework on which Section 1222(a)(2)(A) is premised. Section 1222(a)(2)(A) accords Chapter 12 debtors meaningful relief in a specific manner—by stripping priority from specified claims as to which provision for full payment would otherwise be a prerequisite to confirmation of the plan. Section 1222(a)(2)(A) does not purport to alter the established rules—central among which is the distinction between pre- and post-petition liabilities—that are used to determine whether particular debts are collectible inside or outside bankruptcy. To extend bankruptcy relief to debts incurred *after* a Chapter 12 petition was filed would have entailed a much more significant departure from background bankruptcy norms, and such a step could not have been accomplished through simple adjustment of the boundary between priority and non-priority claims.

iii. Petitioners' reliance (Br. 20-22) on 26 U.S.C. 6658 is also unavailing. Section 6658 addresses the effect of a bankruptcy filing on the applicability of penalties under 26 U.S.C. 6651, 6654, and 6655 for failing to make timely tax payments. Section 6658 suspends those penalties "if such tax was incurred by the estate and the failure occurred pursuant to an order of the court finding probable insufficiency of funds of the estate to pay administrative expenses." 26 U.S.C. 6658(a)(1).

Petitioners assert that "Congress used the words 'incurred by the estate' in IRC 6658 to refer to the post-petition incurrence of taxes, just as it used them in Bankruptcy Code 503(b)(1)(B)(i) for the same purpose." Pet. Br. 21. But while petitioners cite (*ibid.*) legislative history reflecting Congress's awareness that taxes "incurred by the estate" would be incurred post-petition, not all post-petition taxes are "incurred by the estate." See p. 29, *supra*. Section 6658 does not address the question whether post-petition income taxes constitute administrative ex-

penses "incurred by the estate" in the context of a Chapter 12 farm bankruptcy.

b. *Various provisions of the Internal Revenue Code bear on the determination whether a post-petition income tax is "incurred by the estate"*

Petitioners contend (Br. 34) that "[t]he Bankruptcy Code, not the [Internal Revenue Code], controls rights and obligations to distribute bankruptcy estate funds to pay taxes and other claims." They argue on that basis that the Court should disregard the Internal Revenue Code, and 26 U.S.C. 1398 and 1399 in particular, in determining whether post-petition income taxes are "incurred by the estate" for purposes of 11 U.S.C. 503(b). Pet. Br. 33-50. That argument is misconceived.

i. Petitioners contend (Br. 33-40) that, because the filing of a Chapter 12 petition creates an estate that can hold property, any federal income taxes attributable to the sale of such property are necessarily incurred by the estate. For that proposition, petitioners rely on 11 U.S.C. 1207, which enumerates the property included in a Chapter 12 estate, and on the fact that "the postpetition income, profits and assets of a Chapter 13 debtor have always been property of the bankruptcy estate." Pet. Br. 39.

The provisions on which petitioners rely, however, do not address the estate's susceptibility to taxes. "A threshold issue to be considered when a debtor files a petition under title 11 is whether the estate created under § 541 of proposed title 11 should be treated as a separate taxable entity." *1977 House Report* 275. As the court of appeals observed (Pet. App. 11), Section 1207 "does not contain the

slightest suggestion that the ability to retain property implies the ability to incur taxes."[12]

ii. Petitioners contend that "[w]hen the Bankruptcy Code was enacted, Congress did not make bankruptcy estates into 'separate' taxable entities." Pet. Br. 36. That is incorrect. The 1978 Act that enacted the Bankruptcy Code included Chapter-specific rules governing the determination whether income realized during the bankruptcy case was taxable under state and local laws to the estate or to the debtor. See 1978 Act, sec. 101, § 346, 92 Stat. 2565 (11 U.S.C. 346). As originally enacted, for example, Section 346(b)(1) provided that in a Chapter 7 or 11 case involving an individual debtor, income was taxable only to the estate and not to the debtor. § 346(b)(1), 92 Stat. 2565. Section 346(c)(1), by contrast, provided that the estate of a partnership or corporate debtor is not a separate entity for tax purposes, and that any income was to be taxed against the debtor as if the bankruptcy case had not commenced. § 346(c)(1), 92 Stat. 2566. Of particular relevance here, Section 346(d) provided that the estate of a Chapter 13 debtor was not a separate taxable entity and that any income was to be taxed to the debtor only. § 346(d), 92 Stat. 2566; see *1977 House Report* 276, 277 (The Chapter 13 "estate is not a separate taxable entity," and "Section 346(d) indicates that any income * * * is to be taxed only to the debtor.").

Apparently because of a concern over proper committee jurisdiction, the rules set forth in 11 U.S.C. 346 (1982) ap-

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[12] Even under petitioners' theory, the income tax arising from an asset sale that occurs after plan confirmation would not be a tax "incurred by the estate" because, "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. 1227(b); cf. Pet. Br. 40-42 (arguing that "[t]axation of income after plan confirmation is unclear").

plied only to state and local taxes.[18] Those rules served, however, as the precursors to 26 U.S.C. 1398 and 1399, which were enacted two years later. Indeed, the *1977 House Report* noted the "strong bankruptcy policy that these provisions apply equally to Federal, State, and local taxes," *1977 House Report* 275, and it specifically anticipated the eventual extension of the same rules to federal taxes. The Report explained: "Though the bill has been amended to remove Federal taxes from the scope of the four sections, the discussion in this section will proceed as though the bill had not been so amended. This will give a better picture of how these provisions would apply to Federal taxes should the Ways and Means Committee decide in its bankruptcy-tax bill to follow with respect to Federal taxes the proposals made here with respect to State and local taxes." *Ibid.*

iii. Congress amended 11 U.S.C. 346 in 2005 in the same law that added Section 1222(a)(2)(A). BAPCPA § 719(a)(1), 119 Stat. 131. Section 346(b) now provides as follows:

> Whenever the Internal Revenue Code of 1986 provides that no separate taxable estate shall be created in a case concerning a debtor under this title, and the income, gain, loss, deductions, and credits of an estate shall be taxed to or claimed by the debtor, such income,

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[18] The *1977 House Report* stated:

> [I]n order to avoid any possible jurisdictional conflict with the Ways and Means Committee over the applicability of these provisions to federal taxes, H.R. 8200 has been amended to make the sections inapplicable to Federal taxes. The amendment will expedite Floor consideration of the remainder of the bill, because it will obviate the need for a sequential referral of the bill to Ways and Means, which will be considering these provisions and other bankruptcy-related tax law later in this Congress.

1977 House Report 275.

> gain, loss, deductions, and credits shall be taxed to or claimed by the debtor under a State or local law imposing a tax on or measured by income and may not be taxed to or claimed by the estate.

11 U.S.C. 346(b). Congress thus expressly linked the proper incidence of state and local taxes in the bankruptcy context to the presence or absence of a "separate taxable estate" under the Internal Revenue Code. See H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 105 (2005) (explaining that amended Section 346(b) "conforms state and local tax administration to the Internal Revenue Code in the following areas: division of tax liabilities and responsibilities between the estate and the debtor"). In combination with 26 U.S.C. 1398 and 1399, amended Section 346(b) requires that the post-petition income of a Chapter 12 debtor be taxed under state and local law to the debtor rather than to the bankruptcy estate. There is no sound reason to ignore Sections 1398 and 1399 in determining whether analogous federal income taxes are "incurred by the estate."

3. The treatment of post-petition income taxes under Chapter 13 confirms that such taxes are not administrative expenses under Chapter 12

As discussed above (pp. 20, 22-23, *supra*), Chapter 12 was modeled on Chapter 13, and 26 U.S.C. 1398 and 1399 treat the two chapters alike. Bankruptcy courts have recognized that Chapter 13 estates cannot "incur" income taxes, and that post-petition income taxes therefore are not collectible as administrative expenses. See, *e.g.*, *In re Whall*, 391 B.R. 1, 5-6 (Bankr. D. Mass. 2008); *In re Brown*, No. 05-41071, 2006 WL 3370867, at *3 (Bankr. D. Mass. Nov. 20, 2006); *In re Gyulafia*, 65 B.R. 913, 916 (D. Kan. 1986); see also 4 *Collier Bankruptcy Manual* ¶ 1305.02[1],

at 1305-4 (Alan N. Resnick & Henry J. Sommer eds., 4th ed. Nov. 2010) ("[A] tax on postpetition income of the debtor or of the Chapter 13 estate is not a liability of the chapter 13 estate; it is a liability of the debtor alone, by virtue of section 346(b)."). The IRS has reached the same conclusion. See, *e.g.*, I.R.M. 5.9.10.9.2(3) (2006) ("Claims for postpetition taxes should not be filed as administrative claims because the Service views postpetition taxes as constituting a liability of the debtor, rather than the [Chapter 13] estate.").[14] Indeed, petitioners acknowledge (Br. 44) that "[i]f the IRS declines to file a proof of claim [under 11 U.S.C. 1305], the postpetition tax claim is no longer treated in the [Chapter 13] bankruptcy case, and becomes a personal liability of the debtor."[15]

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[14] See also IRS Chief Couns. Advice No. 200113027, at 6 (Mar. 30, 2001), 2001 WL 307746, at *4 ("[O]ur position is that since post-petition tax liabilities are, in Chapter 13 cases, incurred by the debtor, rather than the bankruptcy estate, characterizing such liabilities as administrative expenses is inconsistent with section 503 of the Bankruptcy Code and is not a practice which should be perpetuated."); IRS Litig. Guideline Mem. GL-26, at 9 (Dec. 16, 1996), 1996 WL 33107107, at *6 (stating that submission of a request for payment of a Chapter 13 debtor's post-petition taxes as administrative expenses "is not a viable option for the Service").

[15] As explained above (see p. 21, *supra*), 11 U.S.C. 1305(a)(1) authorizes the filing of a proof of claim "for taxes that become payable to a governmental unit while the case is pending." If a Chapter 13 debtor's post-petition income taxes could be treated as "administrative expenses," however, the government would be entitled to payment of such taxes "[b]efore or at the time of each payment to creditors under the plan." 11 U.S.C. 1326(b); see 11 U.S.C. 1326(b)(1); cf. pp. 15-16, *supra* (discussing analogous super-priority status of administrative expenses in Chapter 12 cases under Section 1226(b)(1)). If that option were available, the government would have no incentive to invoke Section 1305(a)(1) because it could obtain higher priority treatment of the post-petition tax debt via Section 1326(b)(1)—thereby "render[ing] section

None of the statutory provisions that potentially bear on the determination whether a post-petition tax debt constitutes an "administrative expense"—see 11 U.S.C. 503(b), 507(a)(2), 1226(b)(1), 1326(b)(1); 26 U.S.C. 1398, 1399—distinguishes between Chapters 12 and 13. Petitioners assert (without meaningful elaboration) that the established understanding of Chapter 13 is irrelevant here because Chapter 12 contains no provision analogous to Section 1305. Pet. Br. 44-45. That is a non sequitur. Far from strengthening petitioners' position, the absence from Chapter 12 of any counterpart to Section 1305 underscores Congress's intent that the post-petition income taxes of Chapter 12 debtors should be collected outside the bankruptcy plan. See p. 21, *supra*. Since Section 1222(a)(2)(A) simply strips priority status from governmental claims that would otherwise be payable in full under the plan, it has no effect on liabilities (like the tax debt at issue here) that are collectible outside the plan as personal obligations of the debtor.

1305(a)(1) superfluous or at least insignificant." *Gyulafia*, 65 B.R. at 917.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 11 U.S.C. 101 provides, in pertinent part:

Definitions

In this title the following definitions shall apply:

* * * * *

(10) The term "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

* * * * *

2. 11 U.S.C. 346 (1982), as enacted by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, Sec. 101(a), § 346, 92 Stat. 2565, provides, in pertinent part:

Special tax provisions

(a) Except to the extent otherwise provided in this section, subsections (b), (c), (d), (e), (g), (h), (i) and (j) of this section apply notwithstanding any State or local law imposing a tax, but subject to the Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.).

(b)(1) In a case under chapter 7 or 11 of this title concerning an individual, any income of the estate may be taxed under a State or local law imposing a tax on or measured by income only to the estate, and may not be

taxed to such individual. Except as provided in section 728 if this title, if such individual is a partner in a partnership, any gain or loss resulting from a distribution of property from such partnership, or any distributive share of income, gain, loss, deduction, or credit of such individual that is distributed, or considered distributed, from such partnership, after the commencement of the case is gain, loss, income, deduction, or credit, as the case may be, of the estate.

* * * * *

(c)(1) The commencement of a case under this title concerning a corporation or a partnership doe not effect a change in the status of such corporation or partnership for the purposes of any State or local law imposing a tax on or measured by income. Except as otherwise provided in this section and in section 728 of this title, any income of the estate in such case may be taxed only as though such case had not been commenced.

* * * * *

(d) In a case under chapter 13 of this title, any income of the estate or the debtor may be taxed under a State or local law imposing a tax on or measured by income only to the debtor, and may not be taxed to the estate.

* * * * *

3. 11 U.S.C. 346 provides, in pertinent part:

Special provisions related to the treatment of State and local taxes

* * * * *

(b) Whenever the Internal Revenue Code of 1986 provides that no separate taxable estate shall be created in a case concerning a debtor under this title, and the income, gain, loss, deductions, and credits of an estate shall be taxed to or claimed by the debtor, such income, gain, loss, deductions, and credits shall be taxed to or claimed by the debtor under a State or local law imposing a tax on or measured by income and may not be taxed to or claimed by the estate. The trustee shall make such tax returns of income of corporations and of partnerships as are required under any State or local law, but with respect to partnerships, shall make such returns only to the extent such returns are also required to be made under such Code. The estate shall be liable for any tax imposed on such corporation or partnership, but not for any tax imposed on partners or members.

* * * * *

4. 11 U.S.C. 502 provides, in pertinent part:

Allowance of claims or interests

* * * * *

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the

United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

* * * * *

5. 11 U.S.C. 503 provides, in pertinent part:

Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate including—

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substan-

tially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax—

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

* * * * *

6. 11 U.S.C. 507(a) provides, pertinent part:

Priorities

(a) The following expenses and claims have priority in the following order:

* * * * *

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

* * * * *

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a

prior case under this title during that 240-day period, plus 90 days.[1]

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(c) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

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[1] So in original. The period should be "; or".

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time dur-

ing which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

* * * * *

7. 11 U.S.C. 1222 provides, in pertinent part:

Contents of plan

(a) The plan shall—

* * * * *

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; or

(B) the holder of a particular claim agrees to a different treatment of that claim;

* * * * *

8. 11 U.S.C. 1226 provides, in pertinent part:

Payments

* * * * *

(b) Before or at the time of each payment to creditors under the plan, there shall be paid—

(1) any unpaid claim of the kind specified in section 507(a)(2) of this title; and

* * * * *

9. 11 U.S.C. 1227(a) provides:

Effect of confirmation

(a) Except as provided in section 1228(a) of this title, the provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor, whether or not the claim of such creditor, such equity security holder, or such general partner in the debtor is provided for by the plan, and whether or not such creditor, such equity security holder, or such general partner in the debtor has objected to, has accepted, or has rejected the plan.

10. 11 U.S.C. 1228(a) provides:

Discharge

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a

judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(9) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

(2) of the kind specified in section 523(a) of this title.

11. 11 U.S.C. 1305 provides, in pertinent part:

Filing and allowance of postpetition claims

(a) A proof of claim may be filed by any entity that holds a claim against the debtor—

(1) for taxes that become payable to a governmental unit while the case is pending; or

(2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.

* * * * *

12. 11 U.S.C. 1322 provides, in pertinent part:

Contents of plan

(a) The plan shall—

* * * * *

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;

* * * * *

13. 11 U.S.C. 1326 provides, in pertinent part:

Payments

* * * * *

(b) Before or at the time of each payment to creditors under the plan, there shall be paid—

(1) any unpaid claim of the kind specified in section 507(a)(2) of this title;

* * * * *

14. 26 U.S.C. 1398(a) provides:

Rules relating to individuals' title 11 cases

(a) Cases to which section applies

Except as provided in subsection (b), this section shall apply to any case under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of title 11 of the United States Code in which the debtor is an individual.

15. 26 U.S.C. 1399 provides:

No separate taxable entities for partnerships, corporations, etc.

Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code.

16. 26 U.S.C. 6012 provides, in pertinent part:

Persons required to make returns of income

* * * * *

(b) Returns made by fiduciaries and receivers.—

* * * * *

(3) Receivers, trustees and assignees for corporations

In a case where a receiver, trustee in a case under Title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

* * * * *

17. 26 U.S.C. 6151 provides, in pertinent part:

Time and place for paying tax shown on returns

(a) General rule

Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at

the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

* * * * *

18. 26 U.S.C. 6658 provides, in pertinent part:

Coordination with Title 11

(a) Certain failures to pay tax

No addition to the tax shall be made under section 6651, 6654, or 6655 for failure to make timely payment of tax with respect to a period during which a case is pending under Title 11 of the United States Code—

(1) if such tax was incurred by the estate and the failure occurred pursuant to an order of the court finding probable insufficiency of funds of the estate to pay administrative expenses, or

(2) if—

(A) such tax was incurred by the debtor before the earlier of the order for relief or (in the involuntary case) the appointment of a trustee, and

(B)(i) the petition was filed before the due date prescribed by law (including extensions) for filing a return of such tax, or

(ii) the date for making the addition to the tax occurs on or after the day on which the petition was filed.

* * * * *

19. Section 5.9.9.9.3 of the current version of the Internal Revenue Manual (2006) provides, in pertinent part:

Postpetition Liabilities in Chapter 12

1. ***No Provision for Postpetition Tax Debts.*** Unlike a Chapter 13 proceeding, no provision exists for filing claims for postpetition taxes of a debtor who is an individual in a Chapter 12 bankruptcy.

* * * * *

20. Section 5.9.10.9.2 of the current version of the Internal Revenue Manual (2006) provides, in pertinent part:

Section 1305 Claims

* * * * *

3. ***Classification.*** A § 1305 claim is treated as a prepetition claim. Claims for postpetition taxes should not be filed as administrative claims because the Service views postpetition taxes as constituting a liability of the debtor, rather than the estate.

21. Section 25.17.12.9.3 of the Internal Revenue Manual (2004) provides, in pertinent part:

Postpetition Liabilities in Chapter 12

(1) ***No Provision for Postpetition Tax Debts.*** Unlike a Chapter 13 proceeding, no provision exists for filing claims for postpetition taxes in a Chapter 12 bankruptcy.

* * * * *

22. Section 25.17.12.9.3 of the Internal Revenue Manual (2002) provides, in pertinent part:

Postpetition Liabilities in Chapter 12

(1) ***No Provision for Postpetition Tax Debts.*** There is no provision for filing claims for postpetition taxes in a Chapter 12 bankruptcy as there is in a Chapter 13 proceeding.

* * * * *

23. Section 5.9.10.8 of the Internal Revenue Manual (1998) provides, in pertinent part:

Monitoring Compliance

* * * * *

(4) Much of the property the debtor acquires after the bankruptcy becomes property of the bankruptcy estate, therefore, it is not subject to administrative collection. See BC § 1207(a) for

property of the estate. If the debtor has significant post-petition liabilities, a referral to have the bankruptcy dismissed should be pursued. **Note: there is no provision for post-petition** claims as in a Chapter 13 proceeding.

24. Section 57(13)6.2(5) of the Internal Revenue Manual (1988) provides, in pertinent part:

Compliance Monitoring of Chapter 12 Cases

* * * * *

(5) If the debtor incurs post-petition liabilities, SPf may proceed with collection outside the plan to the extent there are assets not subject to the automatic stay. SPf should request a one-time opinion on how to proceed when Chapter 12 debtors incur post-petition liabilities.

REPLY BRIEF

No. 10-875

In The
Supreme Court of the United States

LYNWOOD D. HALL and BRENDA A. HALL.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The Ninth Circuit Court Of Appeals

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The Government does not dispute that the plain language of Bankruptcy Code 1222(a)(2)(A) applies it to "all claims entitled to priority under section 507," and that Congress "intended to incorporate the priority rules established by the various provisions of Section 507." Resp. 19. Section 507(a)(2) includes "administrative expenses allowed under section 503(b)," which in turn includes "any tax incurred by the estate" under Section 503(b)(1)(B). The plain language does not limit its scope to prepetition tax debts or narrow "any taxes" to just employment taxes as the Government urges. The Government does not question the historical treatment of taxes from postpetition asset sales as administrative expenses.

The Government also does not dispute that the purpose of Section 1222(a)(2)(A) is to demote the priority status of governmental claims resulting from the sale of farm assets and to allow their discharge without full payment. In other words, the Government acknowledges that Section 1222(a)(2)(A) was intended to eliminate priority treatment for *some* taxes, but it argues the range of tax debts included by Congress within Section 1222(a)(2)(A)'s exception is "somewhat smaller than it might otherwise be." Resp. 19. The scope of the priority exception would not just be "somewhat smaller," but nearly non-existent, if the Government prevails. As it concedes, under the 2005 amendments to Section 507(a)(8), all taxes incurred prepetition but during the year in which the bankruptcy case is filed are treated as Section 507(a)(2) priority administrative expense claims. The result is

that virtually no taxes due to farm sales would be covered if the Ninth Circuit is upheld, eviscerating the purpose of Section 1222(a)(2)(A).

The Government's primary argument is that Chapter 12 plans never include postpetition debts and such administrative expense claims cannot be discharged in Chapter 12 cases. If this were true, there would have been no need for Congress to engage in the tortured draftsmanship – using a separate provision of the I.R.C. relating to "separate taxable entities" not referenced in Section 1222(a)(2)(A) to remove administrative expense claims from its scope – that the Government also argues. And in fact, it is not true. Other provisions of the Bankruptcy Code and extensive case law confirm that Chapter 12 plans include postpetition debts, just like other reorganization plans.

The Government's secondary, and contradictory, argument that taxes resulting from sales of bankruptcy estate assets are administrative expense claims in corporate and LLC Chapter 12 cases, but not individual Chapter 12 cases where the debtor's estate is not a "separate taxable entity," is also incorrect. The Bankruptcy Code draws no such distinction, with administrative expense provisions equally applicable in all cases. The argument rests on an attempt to distinguish decades of decisions from this Court in single taxable entity cases through narrow attention to their facts; the holdings were not so limited. The I.R.C. provisions for a single taxable entity in some cases and separate taxable entity in others does not

alter these holdings, or the priority with which estate assets are distributed among different classes of claimants, or the requirement that discharge of debts be determined by Bankruptcy Code discharge provisions. Before enactment of Section 1222(a)(2)(A), the IRS repeatedly sought (and obtained) administrative expense treatment of taxes incurred due to transactions involving bankruptcy estate assets. While the IRS may no longer like the commonsensical understanding of the statutory scheme because of Section 1222(a)(2)(A), its change in course is untenable. Further, to hold that the meaning of administrative expense claims has changed, just to limit the scope of Section 1222(a)(2)(A), would have disruptive and detrimental effects on bankruptcy law and practice.

I. Administrative Expense Claims Are Treated in Chapter 12 Plans and Discharged.

The Government argues that administrative expense claims, including taxes, were not intended to be included in Chapter 12 plans or discharges. It asserts that Chapter 12 administrative expense claims are always treated outside a Chapter 12 plan as superpriority debts payable under Section 1226(b)(1), and as debts deducted in determining the debtor's disposable income used to make plan payments. The statutory language and its application in countless cases flatly contradict the Government's contentions.

A. The Bankruptcy Code Provides That Chapter 12 Plans and Discharges Encompass Administrative Expense Claims.

Section 1222(a) requires that a Chapter 12 plan "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507" subject to the exception at issue here. While Section 1227(a) refers to binding each "creditor," Section 1228(a) provides for the "discharge of all debts provided for by the plan allowed under section 503 of this title" – expressly contemplating Section 503 administrative priority debts being "provided for by the plan" and discharged. If Congress wanted only prepetition debts to be discharged, it could have easily said that the discharge "discharges the debtor from all debts that arose before the date of the order for relief," as it did in Chapter 7. *See* 11 U.S.C. 727(b). The language in Sections 1227(a) and 1228(a) tracks their Chapter 11 counterparts: Section 1141(a) likewise provides for binding "any creditor," and Section 1141(d)(1)(A) "discharges the debtor from any debt that arose before the date of such [plan] confirmation." The Government has not questioned that administrative expense claims, including for taxes incurred during estate administration, must be provided for in Chapter 11 plans and are discharged. *See* Resp. 12, n.3.

Major bankruptcy treatises explain that all priority claims, including administrative expense claims, must be provided for in Chapter 12 plans (subject to the exception at issue here), and may be deferred

instead of paid in cash at confirmation as required in Chapter 11 cases. 8 Resnick & Sommer, COLLIER ON BANKRUPTCY ¶1222.02[2] (16th ed.); 7 NORTON BANKRUPTCY LAW & PRACTICE 133:6 (3d ed. 2010); C. Richard McQueen & Jack F. Williams, TAX ASPECTS OF BANKRUPTCY LAW AND PRACTICE 14.4 (3d ed. updated 2011) ("[A] Chapter 12 debtor may be required to pay in full, under the plan, a variety of tax claims that are entitled to priority under §507 of the Bankruptcy Code, including postpetition taxes entitled to administrative priority under §507(a)(1). . . .").

The Government contends that notwithstanding the express requirement in Section 1222(a) that plans "provide for the full payment" of administrative expense claims, Section 1226(b) means that all administrative expense claims are payable "outside the plan" with "super-priority status." Resp. 7, 15-17. Section 1226(b) actually directs that any unpaid administrative expense claim be paid "before *or at the time of* each payment to creditors under the plan." 11 U.S.C. 1226(b)(1) (emphasis added); *see In re Palombo*, 144 B.R. 516, 518-19 (Bankr. D. Colo. 1992) (Chapter 12 attorneys' fees need not be paid before other creditors under plan). These provisions have been construed extensively, and contrary to the Government's position.

The Bankruptcy Code expressly provides for the option of plan payments being made "outside the plan" directly to creditors, usually secured creditors whose claims will be paid over a period exceeding the three-to-five year plan. This means only that the payment is made directly by the debtor instead of

through the standing trustee, and requires a specific direction in the plan or confirmation order, because self-payment bears on plan feasibility and the trustee's fee is calculated as a percentage of plan payments, and will be reduced proportionately. *See* 11 U.S.C. 1226(c) (trustee shall pay creditors under plan unless plan or confirmation order provides otherwise); 1221(b)(9) (plan provision for secured claim payments over longer than plan term); 28 U.S.C. 586(e) (trustee's fees). Multiple courts have held that Chapter 12 administrative expense claims cannot be paid outside a plan for these reasons. *See In re Beard*, 45 F.3d 113, 116, 120 (6th Cir. 1995) (upholding order allowing direct payment to secured creditors, but requiring administrative expense claims and tax claims to be paid through trustee under plan); *In re Miller*, 288 B.R. 879, 883 (B.A.P. 10th Cir. 2003) (attorneys' fees must be paid as administrative expenses under plan); *In re Greseth*, 78 B.R. 936, 941 (D. Minn. 1987) (Sections 1222(a) and 1226(b)(1) mandate that administrative expense claims be paid under plan, with trustee's fees assessed on such payments); *In re Sorrell*, 286 B.R. 798, 806 (Bankr. D. Utah 2002) (confirmation of Chapter 12 plan denied because attorneys' fees to be paid directly outside the plan); *see also Haden v. Pelofsky*, 212 F.3d 466, 473 (8th Cir. 2000) (permitting direct payments to secured creditors under plans, avoiding trustee's fees); *In re Fulkrod*, 973 F.2d 801, 802-3 (9th Cir. 1992) (Chapter 12 debtor may not pay impaired secured claims outside plan); Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY §100.1, at ¶13 (4th ed.), Sec. Rev. June 24,

2010, www.Ch13online.com (Chapter 13 counterparts 1326(b)(1) and 1322(a)(2) overlap; payments of administrative expense priority claims are under plan).

B. Payment of Taxes and Other Administrative Expenses in Reorganization Cases Is Fundamental.

The Government is likewise simply incorrect in stating that the general structure of the Bankruptcy Code limits Chapter 12 reorganization plans to prepetition debts. Resp. 7, 11-12. The Government cites dicta in a 1991 case, in turn citing a 1988 treatise discussing Section 1305. *In re Ripley*, 926 F.2d 440, 443 (5th Cir. 1991) (citing 5 Lawrence King, COLLIER ON BANKRUPTCY ¶1305.01[1] (15th ed. 1988)). Even in a Chapter 13 wage-earner case with no business operations, completion of a Chapter 13 plan entitles a debtor to a "discharge of all debts provided for by the plan or disallowed under section 502 of this title" with certain exceptions. 11 U.S.C. 1328(a). Those debts include, in a Chapter 13 case, all claims entitled to priority under Section 507, which a Chapter 13 plan is required to include and may pay with deferred cash payments. 11 U.S.C. 1322(a)(2). Chapter 13 plans that do not provide for payment of administrative expense claims will not be confirmed, and may result in case dismissal. *Id.*; 11 U.S.C. 1307(c)(5), 1325(a)(1).

The Government's premise largely applies to a Chapter 7 liquidation case, which involves liquidation of the debtor's assets as they exist on the petition

filing date, and discharges only debts existing on that date. 11 U.S.C. 727(b). The Chapter 7 trustee's administrative expenses are still paid first from bankruptcy estate assets, but the Chapter 7 debtor does not operate a business during case administration and is responsible for his own attorneys' fees. *See Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004). Chapter 11 reorganizations, in contrast, entail operation of a business during administration of a bankruptcy case, while assets are sold, leases are assumed or rejected, and financing and plan terms are negotiated. Chapter 12 reorganizations likewise concern operating farm businesses, where the same types of issues arise. Bankruptcy estates are administered for months or years in both types of reorganization before plans are confirmed.

Taxes, along with other costs of doing business, are incurred and must be paid as administrative expenses during the administration period of a reorganization case, as a matter of long-standing bankruptcy law. Those not requiring court approval are paid in the ordinary course during the administration period pre-confirmation; the court is involved if its approval is needed or there is a dispute over payment.[1]

---

[1] The Government's statement that postpetition debts not qualifying as administrative expenses may be collected outside of bankruptcy conflicts with court's ability to disallow such claims. Section 503(b). Its statement that postpetition consumer expenditures do not qualify as allowable administrative expenses is irrelevant here, but Hall notes that if farmers cannot buy groceries, they cannot operate their farms. Resp. 15.

See 11 U.S.C. 521(j)(1) ("[I]f the debtor fails to file a tax return that becomes due after the commencement of the case, . . . the taxing authority may request that the court enter an order converting or dismissing the case"); 28 U.S.C. 960 (taxes must be paid in bankruptcy cases by due date under non-bankruptcy law, unless excused); I.R.C. 6151 (tax shall be paid when return filed); *Hartford Underwriters Ins. Co. v. UnionPlanters Bank*, 530 U.S. 1, 5, 12 (2000) (holders of "administrative claims" should insist on prompt payment); 4 COLLIER, *supra*, 503.03[5], at 503-17 ("Although courts deal gingerly with the payment of professionals, 'ordinary course of business' administrative expenses . . . generally are paid when due."); 15 COLLIER, *supra*, TX ¶1.05[5][a] ("BAPCPA amends section 507(a)(8) governing the priority of taxes to provide that income and gross receipts taxes for Straddle Years are post-petition administrative expense claims that must be paid in full in the ordinary course, rather than pre-petition priority claims that are not payable until emergence. . . .").

As this Court explained in *Nicholas*, interpreting the counterpart provisions of the Bankruptcy Act of 1898, in liquidation cases, there are two relevant periods – the "prepetition period, before the petition in bankruptcy was filed, and the post-petition period, during the bankruptcy liquidation." *Nicholas v. United States*, 384 U.S. 678, 685-86 (1966). In reorganization cases, there are three relevant periods – the pre-petition period, the reorganization period, and the liquidating bankruptcy period if the reorganization

does not succeed. *Id.* Taxes incurred in the prepetition period have priority under Section 507(a)(8) (with those during the filing year accorded administrative expense priority after 2005).[2] "On the other hand, taxes incurred during the arrangement [reorganization] period are expenses of the Chapter XI proceedings" with administrative expense priority, subordinated only to any administrative expenses of a superseding liquidation case. *Id.* at 687-88.

Contrary to the Government's inference, the Court's opinion in *Holywell* does not hold that administrative expense tax claims are excepted from reorganization plans and discharges. Indeed, *Holywell* held that taxes resulting from asset sales during reorganization cases of an individual and a corporation were payable by the debtors-in-possession and had to be paid by plan-created entities. *Holywell Corp. v. Smith*, 503 U.S. 47, 54-57 (1992). The Government's quote from that case suggests that a plan confirmation order may not "bind the United States or any other creditor with respect to *post-confirmation* claims." *Holywell*, 503 U.S. at 58-59 (emphasis added) (quoted at Resp. 13). As a general principle, the bankruptcy estate and administrative expense period end at plan confirmation. The caveat to that principle is that a plan can provide for the estate to continue, *e.g.*, for an asset sale to occur, and for treatment of a tax claim based on that sale. 11 U.S.C. 1115(b), 1123(5)(D),

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[2] *See* Pet. Br. 28-33 regarding 2005 amendments.

1141(b), 1222(b)(8), 1227(b); *see also* NORTON, *supra*, 130:8 (implementation of Section 1222(a)(2)(A) in a plan sale); *In re Hillis Motors*, 997 F.2d 581, 588 (9th Cir. 1993) (allowance of post-confirmation administrative expenses is unusual, except when an estate continues after confirmation pursuant to plan).[3] Also, some courts have held that the bankruptcy estate continues in a Chapter 12 or 13 case until the plan is completed or case dismissed, resulting in administrative expenses throughout that period. *See* Pet. Br. at 40-42.

C. Disposable Income Computations Concern Plan Implementation, Not Pre-Confirmation Administrative Expenses.

The Government argues that a Chapter 12 debtor's postpetition income taxes are expenses taken into account in determining whether a debtor will have sufficient disposable income to execute the plan, but their payment is not provided for by the plan. Resp. 17. It derives that conclusion from the debtor's obligation to list projected income and expenses including projected tax obligations on Schedules at the beginning of the case, and requirements that in

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[3] The Government says taxes from a post-confirmation asset sale would not be incurred by the estate because plan confirmation vests all property of the estate in the debtor unless the plan provides otherwise. Resp. at 35, n.12, citing 11 U.S.C. 1227(b). A plan providing for an asset sale would also provide the asset remained in the estate until sold, with proceeds and resulting taxes treated under the plan.

some circumstances, a Chapter 12 plan must provide for application of all of the debtor's projected disposable income. *Id.* (citing, *e.g.*, 11 U.S.C. 1225(b)(1)). Expected taxes during the plan implementation period are deducted in Chapter 13 projected disposable income computations. *See, e.g., In re Stimac*, 366 B.R. 889, 892-94 (Bankr. E.D. Wis. 2007). However, Chapter 12 disposable income determinations are not formula-driven like Chapter 13 cases. 11 U.S.C. 1225(b)(2); *cf. Ransom v. FIA Card Servs., N.A.*, 131 S.Ct. 716, 721-22 (2011). They take into account (A) maintenance or support of the debtor, debtor's dependents, or domestic support obligations, and (B) "expenditures necessary for the continuation, preservation and operation of the debtor's business," neither of which categories include capital gains taxes on a farm sale during bankruptcy case administration. 11 U.S.C. 1225(b)(2)(A), (B). Most importantly for this case, however, the computations are made as of the date that payments or distributions are made under the plan, not during the administration period. 11 U.S.C. 1225(b)(1)(B), (C). The administration period in this case has lasted for years past the October 6, 2005 farm sale generating the tax at issue; it is not a post-confirmation tax. Jt. App. 56. Further, whether or not post-confirmation income taxes are included in disposable income calculations does not undercut the fundamental principle that pre-confirmation administrative expenses, including taxes from estate asset sales, must be satisfied for a Chapter 12 reorganization plan to be confirmable, unless Section 1222(a)(2)(A) applies.

D. Section 1222(a)(2)(A) Includes Administrative As Well As Prepetition Priority Claims.

The Government's parsing of Bankruptcy Code provisions to argue that Section 1222(a)(2)(A) excludes administrative expense claims also fails. It says Section 1222(a)(2)(A) refers to "claims entitled to priority under section 507" and infers that Congress thereby intended to include only "claims" referenced in Section 507(a)(1) and (3)-(10) and to exclude "administrative expenses" in Section 507(a)(2). Resp. 13. The notion that Congress intended to refer to all these subsections of Section 507 and not refer to 507(a)(2) is implausible.

- Only Sections 507(a)(8) (taxes in the year before the bankruptcy filing) and 507(a)(2) (administrative expense claims for all taxes during the bankruptcy filing year and post-petition) concern taxes. Section 1222(a)(2)(A) is not limited to Section 507(a)(8) as the Government recognizes,[4] and administrative expense tax claims are the only other subsection the broad reference to "claims entitled to priority under section 507" could encompass.

- "Claim" includes administrative expenses by definition and by repeated usage of the term "claim" for "administrative expense"

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[4] "Congress evidently intended to incorporate the priority rules established by the various provisions of Section 507." Resp. 19.

throughout the Code, including in Section 507(a)(2) itself. Pet. Br. 13-15.

- The Government is mistaken in stating that every Bankruptcy Code reference to administrative expenses as "claims" has a cross reference to Section 507(a)(2). Resp. 14. Section 1226(a)(1) addresses "any unpaid claim allowed under Section 503(b) of this title," *i.e.* administrative expense claims. 11 U.S.C. 1226(a)(1).

- The Government's notion that Congress should have added "claims of the kind specified in Section 507(a)(2)" to "claims entitled to priority under section 507" criticizes Congress for not being redundant. Resp. 14.

The Government also claims a "severe conflict" between Section 1226(b) requiring priority payment of administrative expense claims and Section 1222(a)(2)(A) providing for tax claims to receive unsecured claim treatment only if the debtor achieves a discharge. Resp. 16. The Halls explained in their Opening Brief how plans implement these provisions. Pet. Br. 51. A more detailed explanation is at NORTON, *supra*, 130:6-130:8.

The Government claims that under its constricted view of Section 1222(a)(2), that provision "provides meaningful relief to debtors," while admitting that taxes incurred due to farm asset sales within the entire year of a bankruptcy filing as well as all post-petition sales would not be covered under the 2005 amendments to Section 507(a)(8). Resp. 18-19. The practical effect is not just a "somewhat smaller" range

of tax debts entitled to the priority-stripping treatment. *Id.* at 19. The likelihood that farmers needing bankruptcy relief could strategically sell their assets and delay their bankruptcy filing by as much as a year is slim. It certainly was not an option for the Halls, who filed Chapter 12 to prevent a foreclosure sale and use their farm equity to pay the IRS and other creditors. Both the Tenth Circuit in *In re Dawes*, 652 F.3d 1236 (10th Cir. 2011), and the Ninth Circuit below apparently believed, erroneously, that their interpretation of Section 1222(a)(2)(A) would encompass a significant percentage of farm sales, ignoring Section 507(a)(8) amendments enacted contemporaneously.

E. Chapter 13 Provisions Are Not Dispositive.

The Government reasons that Chapter 12 was modeled on Chapter 13; that Chapter 13 includes Section 1305(a)(1) authorizing a proof of claim for taxes that become payable while the case is pending; that Section 1305(a)(1) would be unnecessary if Section 1322(a)(2) providing for full payment of claims entitled to priority already covered postpetition taxes; therefore, the Chapter 12 counterpart to Section 1322(a)(2), *i.e.* Section 1222(a)(2), does not cover postpetition tax claims. The Government cites no supporting authority. Resp. 20-21.

Chapter 12 farm businesses are more like typical Chapter 11 businesses than Chapter 13 wage-earners, and Chapter 11 postpetition taxes have administrative expense priority despite the lack of a Chapter 11

counterpart to Section 1305. Chapter 12 cases are not "typically confirmed quickly" like Chapter 13 as the Government assumes. Resp. 23-24; *see* Professors' Amicus Brief 32-34.[5] And, Chapter 13 statutory provisions and case law are not as simple as the Government suggests. The principal treatise on Chapter 13 includes lengthy descriptions of conflicts among courts over the nature and treatment of postpetition taxes, including the following:

> The definitions of allowable administrative expenses under §503(b) and of allowable postpetition claims under §1305(a)(1) and (2) are similar in many respects, but not exactly the same. For example, a postpetition debt for taxes that becomes payable to a governmental unit while the Chapter 13 case is pending can be an allowable postpetition claim under §1305(a)(1). A postpetition debt for taxes "incurred by the estate" is allowable as an administrative expense under §503(b)(1)(B). Some courts have concluded that because of the specific provision for postpetition taxes in §1305(a)(1), postpetition taxes cannot be administrative expenses under §503(b). Other courts have found that postpetition taxes can be administrative expenses in a Chapter 13 case. Still other courts have held that postpetition taxes travel

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[5] *See* H.R. REP. NO. 99-764, at 48 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5227, 5249 (Chapter 12 necessary in part because deadlines for filing and confirming a plan were too short under Chapter 13).

> through §1305 to become priority claims entitled to full payment under §1322(a)(2).

Ch13Online.com, *supra*, 302.1 (citations omitted); *see also id.* 292.1 ("Depending on when the taxes arise, are incurred, are assessable, become payable and to what entity, activity or property the taxes relate, postpetition taxes may be priority claims under §507(a)(8), postpetition claims under §1305, administrative expenses under §§503(b)(1) and 507(a)(2) or something else altogether.").

The Government's syllogism is thus flawed, and by no means resolves this case. The bankruptcy court cases cited by the Government saying that Chapter 13 estates cannot incur income taxes so they are not administrative expenses (Resp. 37-38) are just a few of the myriad cases reaching conflicting conclusions. They are also distinguishable in Chapter 12 cases since they rely principally on Section 1305 which has no Chapter 12 counterpart. *In re Whall*, 391 B.R. 1, 6 (Bankr. D. Mass. 2008) (treating post-confirmation tax claim as administrative expense would render Section 1305 ineffectual); *In re Brown*, 2006 WL 3370867, *2 (Bankr. D. Mass. Nov. 20, 2006) ("First, the Court agrees with the analysis in *Gyulafia* that §1305, rather than §503(b), controls postpetition tax claims in Chapter 13."); *In re Gyulafia*, 65 B.R. 913, 915-16 (Bankr. D. Kan. 1986) (court rejects IRS's administrative expense claims; post-confirmation taxes not administrative since estate ended; pre-confirmation taxes "controlled by a very specific statute in Chapter 13, section 1305").

II. Taxes Incurred During Chapter 12 Cases Are Administrative Expenses, Except Under Section 1222(a)(2)(A).

A. "Incurred by the Estate" Means Incurred Postpetition-Preconfirmation, Payable With Estate Assets.

The Government says that whether an income tax is "incurred by the estate" depends on the nature of the debtor and the chapter of the Bankruptcy Code under which relief is sought. Resp. 22. When Congress enacted Section 503(b)(1)(B) with that term, however, administrative expense claims for federal taxes were payable by all debtors in all chapters, with no "separate taxable entity" status for some. The section concerns the priority of administrative expense claims over prepetition claims. The legislative history shows Congress simply focused on when a tax would be considered "before" versus "during" the administrative period of the case, warranting higher priority. It intended the term to be temporal: An income tax was "considered incurred on the last day of the taxable period" while sales and transaction taxes were "incurred on the last day of such transaction or event." *See In re Pacific-Atlantic*, 64 F.3d 1292, 1299-1300 (9th Cir. 1995). The portion of the 1977 House Report cited by the Government does not address Section 503(b)(1)(B) or administrative expenses or priority rights, but rather who bears the "administrative responsibility" for filing tax returns. *See* H.R. REP. NO. 95-595, at 277-78 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6234-35. Whether a debtor-in-possession or trustee files the tax return, the tax is

payable from estate assets with administrative priority, a point this note of history does not concern.

The Halls' interpretation of the Bankruptcy Code is consistent with the I.R.C., as well as venerable bankruptcy law. The I.R.C. ties the duty to pay federal income taxes to the duty to file a tax return. *Holywell*, 503 U.S. at 52. The Government says a corporate Chapter 11 or 12 debtor is liable for such taxes despite the lack of a separate taxable entity because the I.R.C. requires a corporation's trustee to file tax returns. Resp. 26, citing I.R.C. 6012(b)(3). But in nearly all such cases, the individual debtor is a debtor-in-possession with no trustee, just like individual reorganization cases. The person in control of the bankruptcy case and estate must file the tax return and is responsible for ensuring taxes are paid, with no limitation to corporate cases. *See* 28 U.S.C. 960 (persons conducting business under federal court authority taxed as if conducting a private business); *Nicholas*, 384 U.S. at 690 ("As an officer of the bankruptcy court, the debtor in possession was fully subject to taxes and interest incurred during his operation of the business in the Chapter XI arrangement.").

That does not mean the personal money of the individual filing that return is used for payment, in the absence of "responsible person" liability under I.R.C. 6672. Bankruptcy estate funds are used, with taxes incurred in estate administration paid before lower-priority charges. *See, e.g., Nicholas*, 384 U.S. at 699 (administrative expense tax claims "payable only if there are sufficient assets to pay prior expenses"); *In re Samuel Chapman, Inc.*, 394 F.2d 340, 341-42 (2d

Cir. 1968) (estate funds for postpetition taxes during debtor-in-possession and trustee administrative periods); *Ill. Dep't of Revenue v. Schechter*, 195 B.R. 380, 384-85 (Bankr. N.D. Ill. 1996) (Chapter 11 trustee not personally liable for failure to pay postpetition taxes when insufficient estate funds); *see also* 11 U.S.C. 524(a)(1) (discharge under Chapter 12 and other chapters voids "personal liability of the debtor with respect to any debt discharged"); I.R.C. 6903(a) (person's fiduciary assumes powers and rights in respect of such person's taxes "except that the tax shall be collected from the estate of such other person").

The Government is mistaken in advocating that postpetition employment taxes are treated differently under the Bankruptcy Code than a debtor's income taxes based on income earned by use or sale of bankruptcy estate assets. Resp. 27-30. Both are "costs ordinarily incident to operation of a business" and thus accorded administrative expense status under longstanding bankruptcy law. *See Reading Co. v. Brown*, 391 U.S. 471, 483-84 (1968) (taxes and all other operating costs); *In re Luster*, 981 F.2d 277, 280-81 (7th Cir. 1992) ("taxes on gains realized on sales of property during the administration of the estate" are "costs and expenses of administration" under the 1898 Bankruptcy Act). Section 503(b)(1)(B) applies to "*any tax* incurred by the estate . . . including property taxes." (emphasis added). *Holywell* concerned income taxes from sales of bankruptcy estate assets. *Holywell*, 503 U.S. at 50-51; *see also Boteler v. Ingels*, 308 U.S. 57, 61 (1939) (automobile license taxes); *Nicholas*, 384 U.S. at 679-80 (excise and employment

taxes); *Palmer v. Webster & Atlas Bank*, 312 U.S. 156, 163 (1941) ("What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise.") As shown by the cases and IRS position statements cited in the Opening Brief, this is a point the IRS has repeatedly supported, advocating for administrative expense priority treatment of postpetition tax claims. Pet. Br. 48-49. While some cases concerned employment taxes, others concerned income taxes on bankruptcy estate asset sales. *Holywell*, 503 U.S. at 50-51. The IRS memoranda cited by the Government stating that there is no Chapter 12 provision for filing postpetition proofs of claim, unlike Section 1305, is both accurate and irrelevant to seeking and enjoying administrative expense treatment for postpetition tax claims that require no such filing. Resp. 24-25; 11 U.S.C. 503(b)(1)(B).

B. Bankruptcy Code Legislative History Supports the Halls.

The legislative history of Sections 507(a) and 503(b)(1)(B) regarding administrative priority of "any tax incurred by the estate" and including capital gains taxes from estate asset sales does indeed precede the enactment of I.R.C. provisions for some bankruptcy estates being separate taxable entities. Resp. 39-40. This shows Congress intended administrative priority treatment for such taxes in all cases for all debtors. The Government cites nothing in the history of the

I.R.C. provisions showing any intent to alter that payment source, payment priority, or long-standing bankruptcy law. To the contrary, the legislative history of I.R.C. 6658 shows that when Congress enacted I.R.C. 1398 and 1399 it considered taxes "incurred by the estate" and "administrative expenses" to be interchangeable concepts without nuanced distinctions between types of cases and debtors. Pet. Br. 20-21.

The legislative history of Section 1222(a)(2)(A) shows that the lead sponsor of that provision (and BAPCPA generally) explained to his colleagues in Congress – including when they first passed it in 2000 – that (i) it applied to capital gains taxes "generated during a bankruptcy reorganization," and (ii) without it, such taxes would have to be paid as priority claims, and the applicable taxing authority could block any farmer's reorganization plan that did not do so. *See* 145 CONG. REC. S727, S764 (1999) (statement of Sen. Charles Grassley) and Pet. Br. 22-28. *See also* NORTON, *supra*, 130:6 (prior to 2005 enactment, capital gains taxes from sale or deed-back of collateral to a secured creditor had to be paid in full, causing many family farmer plans to be denied confirmation, citing *inter alia In re Sprecht*, copied in Professors' Amicus Brief).

The Government repeatedly cites to portions of the Bankruptcy Code legislative history on Section 346 concerning state and local taxation. Resp. 22, 23, 31, 34-36. The Government implies that certain language related to Section 503 on administrative priority. Resp. 22. The cited text concerns only Section 346. The discrepancy between responsibility to file a

return and arrange for payment referenced there, and the source of funds to pay and priority rights to such funds over other creditors, is brought home by the 1978 version of Section 346(e) and its legislative history. That subsection read:

> (e) *A claim allowed under section* 502(f) or *503 of this title, other than a claim for a tax that is not otherwise deductible* or a capital expenditure that is not otherwise deductible, *is deductible by the entity to which income of the estate is taxed* unless such claim was deducted by another entity, and a deduction for such claim is deemed to be a deduction attributable to a business.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, ch. 3, §346(e), 92 Stat. 2549, 2566 (1978) (emphasis added). In more common language, the legislative history explained the tax reference as follows:

> It is important to point out that there are *two kinds of administrative expenses that are not deductible* under section 346(e) of title 11. First, a claim for a tax that is not otherwise deductible, such as State tax on a State tax return or *Federal tax on a Federal tax return*, is excluded when appropriate.

H.R. REP. NO. 95-595, at 278 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, at 6235. The "entity to which income of the estate is taxed," be it a separate entity in certain individual cases for state and local tax purposes, or the single entity of a corporate or individual debtor in other cases, could deduct some Section 503 administrative expenses on its tax returns. But tax

payments are one kind of administrative expense that cannot be deducted on tax returns. Tax payments must be administrative expenses in the first place or the exclusionary language in Section 346(e) would have been unnecessary. Subsection (e) was removed from Section 346 in 2005, but similar language remains in I.R.C. 1398(h)(1). *See* William Tatlock, *Discharge of Indebtedness, Bankruptcy and Insolvency*, TAX MANAGEMENT 540-3RD, at A54 (2009) (comparing former 346(e) to I.R.C. 1398(h)(1)); *id.* at A53 ("[F]ederal income taxes are not deductible (disallowed under [I.R.C.] §275), even though taxes are allowable as administrative expenses."). Single taxable entities consisting of the debtor-in-possession and his/its estate are taxed during estate administration, and pay the taxes from estate assets on an administrative priority basis.

III. The Halls' Interpretation is Consistent With Bankruptcy Law.

The Halls agree with the Government that when interpreting BAPCPA, the Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Hamilton v. Lanning*, 130 S.Ct. 2464, 2473 (2010) (quoting *Travelers Cas. & Surety Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 454 (2007)); Resp. at 19. There is no such indication in the BAPCPA provisions at issue here. Under long-standing bankruptcy practice, taxes from bankruptcy asset sales and other debts incurred during administration of a reorganization hold high priority entitlement

to payment from the bankruptcy estate *res*. Such expenses are payable by the debtor-in-possession or trustee in the ordinary course without court approval, and if still unpaid when a plan is confirmed, must be satisfied as priority claims under the plan. The debtor-in-possession is discharged from all such debts addressed in the plan upon confirmation in Chapter 11 cases and plan completion in Chapter 12 and 13 cases. The debtor-in-possession is not personally liable for such debts any more than a trustee, except to the extent they are non-dischargeable and not satisfied under the plan.

These are fundamental principles of bankruptcy, and Congress did not intend to alter them when enacting I.R.C. 1398, 1399 creating separate taxable entities in some cases, and retaining single taxable entity status in others. Interpreting Section 507(a)(2) as not including postpetition income taxes would mean a substantial Treasury loss in large and extended Chapter 11 cases, and in most liquidating Chapter 11 and Chapter 7 cases where there is no ongoing debtor to pay taxes. *See* Dawes Amicus Brief. Section 507(a)(2) applies to all bankruptcy debtors and chapters. Disrupting all bankruptcy cases to advance a narrow IRS focus on limiting the effect of Section 1222(a)(2)(A) is hazardous.

Congress understood that capital gains taxes from sales of family farms shortly before and during a bankruptcy case would result in priority claims that had to be paid in full to confirm a Chapter 12 plan, in accordance with time-honored law, Bankruptcy Code

provisions and IRS advocacy in the courts, and with no distinction among farmers operating as sole proprietors, partnerships, corporations or LLCs. Section 1222(a)(2)(A) was written broadly to provide an exception to all priority taxes from farm asset sales to enable family farmers to confirm plans that would downsize their farm assets, pay their creditors with sale proceeds, and be discharged from the tax liability arising from the sale. It does not reference I.R.C. "taxable entities," and the I.R.C. should not prevent implementation of Congressional intent to help distressed family farmers.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

LYNWOOD D. HALL AND BRENDA A. HALL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* DONALD W. DAWES AND PHYLLIS C. DAWES IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Donald W. Dawes and Phyllis C. Dawes respectfully submit this brief in support of Petitioners Lynwood D. Hall and Brenda A. Hall. Like the Halls, the Daweses owned and operated a family farm. Like the Halls, the Daweses filed a chapter 12 plan of reorganization that proposed to treat the IRS's tax claim arising from the post-petition disposition of certain farm property as a general, non-priority obligation under section 1222(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 1222(a)(2)(A). The IRS objected. Like the Ninth Circuit in *Hall v. United States*, Pet. App. 1, the Tenth Circuit held in the Daweses' case that section 1222(a)(2)(A) did not authorize the bankruptcy court to treat the IRS's tax claim as a dischargeable, non-priority debt. *United States v. Dawes (In re Dawes)*, No. 09-3129, 2011 WL 2450930, at *8 (10th Cir. June 21, 2011).

On August 17, 2011, the Daweses filed a petition for writ of certiorari in their case (no. 11-

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both Petitioners and Respondent have consented to the filing of this brief. Copies of Petitioners' and Respondent's consents are filed herewith.

217). Because the questions presented in *Hall* and *Dawes* are identical, the Daweses anticipate that the Court may hold their petition pending a decision in the Halls' case and, following a decision, "GVR" their case (if appropriate). For this reason, the outcome here is likely to directly affect the outcome of the Daweses' case.

The purpose of this brief is to address matters that bear on the Court's resolution of the important bankruptcy question presented: whether taxes arising from the post-petition sale of farm assets are entitled to non-priority treatment under section 1222(a)(2)(A). Section 1222(a)(2)(A) provides that post-petition taxes that would otherwise be entitled to payment on a priority basis are instead to be treated as non-priority claims that the debtor may discharge short of full payment. In general, priority claims are enumerated in section 507 of the Bankruptcy Code, 11 U.S.C. § 507, and include post-petition taxes set forth in section 503(b) of the Code, 11 U.S.C. § 503(b). The point of section 1222(a)(2)(A) is to give the reorganizing chapter 12 debtor a tax break by demoting certain priority tax claims to non-priority status so they can be paid on a reduced basis from funds available to pay general unsecured claims, with any unpaid balance discharged in bankruptcy.

The court below sidestepped section 1222(a)(2)(A) by concluding that the IRS's claim for post-petition taxes arising from the sale of

property belonging to the debtors' bankruptcy estate did not qualify as a priority claim under section 507 because the taxes were not "incurred by the estate" within the meaning of section 503(b). The court based its theory *not* on the Bankruptcy Code, but rather on section 1399 of the Internal Revenue Code ("IRC"), 26 U.S.C. § 1399. The Ninth Circuit's theory is unsound, and the purpose of this brief is to illustrate how it is at war with basic principles of bankruptcy administration, the Code's treatment of administrative expenses, the text and purpose of sections 1222(a)(2)(A) and 503(b), and the historical treatment of tax claims in bankruptcy. The Daweses respectfully submit that, in deciding this controversy, the Court would benefit from consideration of the matters addressed in this brief.

STATEMENT

On August 9, 2005, the Halls filed for chapter 12 bankruptcy relief. Pet. App. 35. By operation of law, the filing of a chapter 12 petition creates a bankruptcy estate consisting of all of the debtors' property, including any farming assets. 11 U.S.C. §§ 541, 1207. Accordingly, when the Halls commenced their bankruptcy case, their farmland passed to their estate.

On September 22, 2005, the Halls moved to sell their 320-acre farm for the sum of $960,000, and the bankruptcy court granted their motion. Pet. App. 35. The sale of the farm

resulted in a capital gains tax of about $29,000. *Id.* In their First Amended Plan, the Halls proposed to include this tax liability as a non-priority, unsecured claim payable from available funds after more senior claims were satisfied, with any unpaid balance to be discharged upon the Halls' completion of the payments called for under their plan. J.A. 31-36. As authority for this disposition, the Halls invoked section 1222(a)(2)(A), 11 U.S.C. § 1222(a)(2)(A). As noted, section 1222(a)(2)(A) authorizes a chapter 12 debtor to treat certain "priority" claims as non-priority, general obligations.

The IRS objected. It argued that the tax liability resulting from the sale was not entitled to treatment under section 1222(a)(2)(A) on the theory that the tax liability was not a "priority" claim. Priority claims are set forth in section 507(a) of the Code, 11 U.S.C. § 507(a), and include (but are not limited to) administrative priority tax claims "incurred by" a debtor's bankruptcy "estate" under section 503(b), *id.* §§ 503(b), 507(a). The IRS argued that the capital gains taxes in question were not "incurred by" the Halls' "estate" within the meaning of section 503(b), but rather belong outside the bankruptcy process as a claim against the Halls personally. As support for this theory, the IRS invoked sections 1398 and 1399 of the IRC. 26 U.S.C. §§ 1398, 1399. Section 1399 provides that "no separate taxable entity shall result from the commencement of a case" under the Bankruptcy

Code "[e]xcept any case to which section 1398 applies." *Id.* § 1399. Section 1398 creates an exception to section 1399 for cases "under chapter 7 . . . or chapter 11 . . . of title 11 of the United States Code in which the debtor is an individual." *Id.* § 1398. Citing section 1399, the IRS argued that the tax was incurred by the Halls, not their estate, and thus the tax became essentially immune from the bankruptcy process.

The bankruptcy court agreed with the IRS. It concluded: "[b]ecause the taxes arising from the postpetition sale of the farm do not qualify as an administrative expense under § 503(b) and are not entitled to priority under § 507, they do not fall within the purview of § 1222(a)(2)(A)'s exception and may not 'be treated as an unsecured claim that is not entitled to priority.'" Pet. App. 46.

On appeal, however, the district court reversed, holding that the Halls could "treat postpetition income taxes incurred from the postpetition sale of their farm as a liability of the estate, dischargeable under § 1222, and the plan may propose payment of such expenses by the estate." Pet. App. 23. In reaching this conclusion, the district court quoted with approval the district court's decision in *In re Knudsen*, 389 B.R. 643, 680-81 (N.D. Iowa 2008), stating: "[t]he bankruptcy court's fundamental error, this court finds, was accepting the IRS's characterization of the pertinent provisions as federal in-

come tax provisions found in the Bankruptcy Code, when they are properly understood as bankruptcy provisions to be construed in accordance with the Bankruptcy Code and bankruptcy policy to promote the effective reorganization of family farming operations." Pet. App. 32.

The IRS appealed to the Ninth Circuit, which in turn reversed the district court. Pet. App. 16. Like the bankruptcy court, the Ninth Circuit conducted its analysis by looking outside the Bankruptcy Code to sections 1398 and 1399 of the IRC. Pet. App. 6-7. Citing section 1399, the court reasoned that, because the commencement of a chapter 12 case does not create a separate taxable entity for purposes of the IRC, the Halls' chapter 12 estate could not have "incurred" the taxes in question for purposes of section 503(b), *id.*, and thus section 1222(a)(2)(A) was inapplicable. Pet. App. 6. Instead, the court stated that "the tax is payable in full because it is incurred and owed by the debtor outside of the plan. . . ." Pet. App. 8 n.2.

In dissent, Judge Paez disagreed, writing that "Congress's intent was clear: it wanted to help family farmers keep their farms by allowing them to sell farm assets to pay off debts without being liable for the full amount of any capital gains tax arising from the sale, regardless of whether they sold the assets before or after filing their chapter 12 petition." Pet. App. 16. (Paez, J., dissenting). This appeal followed.

SUMMARY OF ARGUMENT

Section 1222(a)(2)(A) of the Bankruptcy Code provides that, in chapter 12 cases, priority claims held by governmental entities may be treated as non-priority obligations. For purposes of section 1222(a)(2)(A), section 507 lists the claims that are generally entitled to priority, and these include administrative expenses under section 503(b). In turn, section 503(b) includes as administrative expenses "the actual, necessary costs and expenses of preserving the estate" and cites as an example "any tax . . . incurred by the estate . . . except a tax of a kind specified in section 507(a)(8)." (Section 507(a)(8) applies to certain kinds of pre-petition income taxes).

The court below determined that, by operation of section 1399, the IRS's claim for capital gains taxes arising from the post-petition sale of farmland belonging to the Halls' bankruptcy estate is not an administrative expense because the taxes were not "incurred by the estate." If that is correct, however, what exactly is the IRS's claim for bankruptcy purposes? The Ninth Circuit concluded that the taxes are the Halls' obligation personally and not an administrative debt of their estate. But that makes no sense as a rule of law because in many bankruptcy cases (including most of the biggest ones), that will mean the IRS will lose any payment entitlement whatsoever, and the rule adopted below other-

wise makes a hash out of the bankruptcy process.

For example, as the court below acknowledged, section 1399 applies equally to corporate chapter 11 and chapter 7 bankruptcy cases. Pet. App. 10 n.4. Significantly, in *all* corporate chapter 7 cases, and most corporate chapter 11 proceedings, the debtor's bankruptcy estate acquires and liquidates the debtor's assets, leaving behind no surviving "debtor" with any property. Under the Ninth Circuit's approach, if a corporate chapter 7 or 11 estate sells a very valuable asset and incurs $1 million in taxes to the IRS, this debt cannot be paid as an administrative expense because it has not been "incurred by the estate." Instead, it somehow remains exclusively an obligation of the debtor on the theory that, under section 1399, the filing of a bankruptcy case does not create a separate taxable entity. Of course, by definition, the "debtor" in a liquidating chapter 7 or chapter 11 case has been stripped of its property and will thus lack the wherewithal to pay the claim. As a result, the IRS may recover nothing.

The fundamental error of the decision below is that it conflates two entirely separate questions: (1) the bankruptcy law question of how tax claims should be treated in bankruptcy, with (2) the tax law question of who is responsible for filing a tax return for a bankrupt debtor and/or the debtor's bankruptcy estate, and

whether, for tax purposes, the debtor should be consolidated with the debtor's estate. Critically, there is no evidence that, in enacting section 1399 to deal with the second question, Congress intended section 1399 to supplant and fundamentally undermine the carefully constructed bankruptcy apparatus dealing with the first. In this case, the IRS seeks to import improperly a provision of the IRC to effectively disrupt and largely dismantle not only section 1222(a)(2)(A), but also the operation of a significant part of section 503(b). This is a dangerous theory that, ironically, can only hurt the IRS in liquidating bankruptcy cases in which the debtor is not an individual.

The decision below conflicts with this Court's precedents regarding the broad scope of administrative expense liability, *see, e.g., Reading Co. v. Brown*, 391 U.S. 471, 485 (1968) (holding that unliquidated tort liabilities are properly administrative expenses), as well as the Court's prior conclusion that post-petition taxes are entitled to administrative priority, *see Nicholas v. United States*, 384 U.S. 678, 687-88 (1966). There is no evidence that when Congress enacted section 1399, it intended to overturn decades of settled precedent that taxes arising from the post-petition sale of property of the debtor's bankruptcy estate are entitled to administrative priority status. Moreover, the clear understanding that such taxes *are* entitled to administrative priority is what animated Congress's passage of

section 1222(a)(2)(A) in the first place. In essence, the theory of the court below is that when Congress enacted section 1222(a)(2)(A), it misunderstood the nature of the problem it thought it was solving – that the kinds of taxes it understood to be administrative expenses and that it directed be given non-priority status and discharged are in fact obligations only of the debtor outside the bankruptcy process that may not be discharged. Given the history of the treatment of post-petition taxes as administrative expenses, that view is implausible in the extreme.

The decision below is also flawed analytically for an additional reason: it seeks to create an implied exception to the Bankruptcy Code's treatment of claims through the importation of an alien provision of another part of the United States Code that was not designed for that purpose. Once again, it is implausible that Congress authorized such a move. More important, there is simply insufficient evidence – textual or otherwise – to overcome the presumption that when Congress intends to create exceptions to relief under the Bankruptcy Code, it does so expressly and not by such obscure circumlocution. *See FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293 (2003); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985).

Furthermore, the legislative histories of section 1222(a)(2)(A) and section 503(b)(1)(B)(i) seriously undermine the reasoning of the court

below. Chapter 12 was "designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land." H.R. REP. NO. 99-958, at 48 (1986). Senator Grassley, the original proponent of section 1222(a)(2)(A), proposed to amend section 1222 to reduce the priority of claims owed to governmental entities as a result of the sale of certain assets during a bankruptcy reorganization in order to "free up capital for investment in the farm, and help farmers stay in the business of farming." 145 CONG. REC. S764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley). When he first offered the language that would eventually become section 1222(a)(2)(A), he explained that it was intended to cover the situation presented in this case. *See id.* In the years that followed as this provision worked its way through Congress, the Senator never wavered from that initial interpretation, no one contradicted it, and he was ultimately successful in getting his language enacted. *Compare* S. 260, 106th Cong. § 3 (1999); Stat. App. 16a *with* 11 U.S.C. § 1222(a)(2)(A); Stat. App. 5a. Section 1222(a)(2)(A) was clearly intended to provide the relief Petitioners request.

Additionally, the legislative history of section 503(b) supports Petitioners' position. The senate report discussing that section referred to administrative expenses under section 503(b)(2) as including taxes incurred "*in administering the debtor's estate*" or "*during the case.*" S. REP. NO.

95-989, at 66 (1978) (emphases added). These statements sensibly refer to post-petition tax claims such as the one at issue here. The decision below should be reversed.

ARGUMENT

A. A Federal Tax Debt Arising Out of a Chapter 12 Debtor's Post-Petition Sale of a Farm Asset is an Administrative Claim Subject to Treatment Under Section 1222(a)(2)(A) and Discharge Under Section 1228.

By operation of law, when a debtor commences a bankruptcy case, a bankruptcy estate is created consisting of all of the debtor's property wherever located and by whomever held. 11 U.S.C. § 541; *Ohio v. Kovacs*, 469 U.S. 274, 284 n.12 (1985) ("The commencement of a case under the Bankruptcy Code creates an estate which, with limited exceptions, consists of all of the debtor's property wherever located."). In addition, the federal court in which the case is commenced is vested with exclusive *in rem* jurisdiction over all property of the bankruptcy estate, and the estate is formed *in custodia legis*. 28 U.S.C. § 1334(e); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004); *Straton v. New*, 283 U.S. 318, 320-21 (1931). Accordingly, if a governmental entity (including the IRS) has seized possession of property in which the estate has an interest before the debtor commences its

bankruptcy case, the bankruptcy court may direct the entity to relinquish possession of the property to the representative of the estate (*i.e.*, either the debtor or the trustee) so that the property may be administered as part of the estate. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 211-12 (1983). In this case, when the Halls commenced their bankruptcy case, their farmland passed to their estate, where it remained until it was sold. Further, any right to payment the IRS has with respect to the sale of this asset properly constitutes a "claim" in the Halls' bankruptcy case entitled to the treatment prescribed by section 1222(a)(2)(A) and to the discharge provisions of section 1228. Nothing in section 1399 of the IRC alters this result.

1. The IRS's right to payment of the capital gains taxes in question is a post-petition administrative expense claim.

Under the Bankruptcy Code, a debtor's monetary obligations constitute "claims" against the debtor's estate. 11 U.S.C. § 101(5); *see Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("bankruptcy . . . converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*"). As this Court has determined, the term "claim" is defined broadly to mean literally any "right to payment." 11 U.S.C. § 101(5); *Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998) ("a 'claim' is defined . . . as a 'right to payment' . . . and a

'right to payment,' we have said, 'is nothing more nor nothing less than an enforceable obligation'") (quoting Pa. *Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)). Similarly, the Code defines the term "debt" broadly to mean any "liability on a claim." 11 U.S.C. § 101(12). As the Court has explained, the terms "claim" and "debt" are synonymous and reflect "Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt.'" *Davenport*, 495 U.S. at 558 (citing H.R. REP. NO. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6266 (describing the definition of "claim" as the "broadest possible" and noting that the Bankruptcy Code "contemplates that all legal obligations of the debtor . . . will be able to be dealt with in the bankruptcy case.")). In this case, the IRS's claim for capital gains taxes is clearly a "claim" (and, correspondingly, a "debt") within the meaning of the Bankruptcy Code.

In general, the Code treats claims as either "pre-petition" or "post-petition" in nature, depending on whether they arise before or after the debtor commences a bankruptcy case. A "creditor" holding a pre-petition claim (including a governmental entity) is generally entitled to file a "proof of claim" with the bankruptcy court. 11 U.S.C. §§ 101(10), 101(15), 101(27), 501(a); Fed. R. Bankr. P. 3001, 3002. Subject to certain exceptions, only creditors (including governmental units) that file proofs of claim may receive distributions from the debtor's bankruptcy estate.

Fed. R. Bankr. P. 3002(a); *New York v. Irving Trust Co.*, 288 U.S. 329, 332-33 (1933). Section 502(b) governs the allowance and disallowance of proofs of claim. 11 U.S.C. § 502; *see Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 449-50 (2007) (discussing the operation of section 502).

In contrast, a person holding a post-petition claim is entitled to file a request for payment of an administrative expense. 11 U.S.C. § 503(a). Section 503(b) governs the allowance and disallowance of administrative expense claims. *Id.* § 503(b). Just as section 502(b) screens out allowable proofs of claim, section 503(b) screens out allowable administrative expense obligations. In general, post-petition taxes incurred during the course of bankruptcy are treated as expenses of administration, without the need to file any proof of claim or request for payment. *Nicholas v. United States*, 384 U.S. 678, 687-88 (1966) ("[T]axes incurred during the arrangement period are expenses of the Chapter XI proceedings and are therefore technically a part of the first priority under s 64a(1)"); *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1381-82 (11th Cir. 1994) (confirming continued validity of this rule under the Bankruptcy Code); *cf. United States v. Noland*, 517 U.S. 535, 543 (1996) ("Congress could have, but did not, deny . . . postpetition tax penalties the first priority given to other administrative expenses, and bankruptcy courts may not take it upon themselves to

make that categorical determination . . . ."). Thus, in the ordinary course, the IRS's claim for any capital gains taxes owing as a result of the post-petition sale of the Halls' farmland would be treated as an administrative debt.

2. The IRS's claim is a priority obligation subject to the provisions of section 1222(a)(2)(A).

Bankrupt debtors typically lack the ability to pay all claims in full, and certain claims are entitled to priority treatment under section 507 of the Code – meaning they are entitled to be paid ahead of general unsecured claims. 11 U.S.C. § 507. Administrative expenses allowed under section 503(b) are granted the second highest level of priority under section 507(a)(2). *Id.* § 507(a)(2). In the ordinary course, the IRS's tax claim would be entitled to this treatment and thus paid ahead of more junior claims. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 4-5 (2000) (noting that, as a rule, administrative expenses are "entitled to priority over prepetition unsecured claims."). In chapter 12 cases, however, this basic rule is modified by section 1222(a)(2)(A).

A chapter 12 debtor is required to file a plan providing for the treatment of the debtor's debts. 11 U.S.C. § 1221. In general, the plan is required to provide for the full payment of all claims entitled to priority under section 507(a),

including administrative expenses under section 503(b). *Id.* §§ 503(b), 507(a)(2), 1222(a)(2). Section 1222(a)(2)(A), however, recognizes an exception for "a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation." *Id.* § 1222(a)(2)(A). This provision directs that, so long as the debtor receives a discharge, such a claim "shall be treated as an unsecured claim that is not entitled to priority under section 507." *Id.* Consistent with the historic understanding that post-petition taxes are administrative expenses, section 1222(a)(2)(A) properly applies to treat the IRS's claim in this case as a non-priority, general unsecured claim that the debtor may discharge without payment in full.

3. The IRS's claim is a dischargeable debt.

As this Court has explained in the chapter 11 context, "[a] preconfirmation debt [i.e., a debt arising before confirmation of a plan including post-petition claims] is dischargeable unless it falls within an express exception to discharge." *FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 303 (2003). The same rule applies in chapter 12.

The scope of a debtor's discharge in chapter 12 is governed principally by section 1228. 11 U.S.C. § 1228. Pursuant to section 1228(a),

the debtor is typically entitled to receive a discharge after completing all payments called for under the plan. Critically, the discharge extends to all debts "provided for" under the plan, other than certain claims specifically excepted. *Id.* §§ 523, 1228(a); *see also id.* § 524 (specifying the effect of a discharge in bankruptcy); 8 COLLIER ON BANKRUPTCY ¶ 1228.02[4], at 1228-4-6 (16th ed. 2011) (discussing the scope of the discharge under section 1228).

In this case, the IRS's claim for capital gains taxes arising from the post-petition sale of farmland belonging to the Halls' bankruptcy estate is not excepted from discharge under any provision of the Code, including sections 1228 or 523. Further, there is no reason why the Halls may not "provide for" the debt in their plan. Thus, it properly falls within the scope of section 1228 and is dischargeable.

The court below suggested that the Halls could not "provide for" the IRS's claim in their plan based on its reading of section 1227. Pet. App. 8 n.2. Section 1227 provides that the terms of a confirmed plan bind "creditors," and the term "creditor" is defined in section 101(10) of the Code to mean only a person holding a pre-petition claim. 11 U.S.C. § 101(10). The court's reliance on section 1227 to support its analysis, however, is unsound. Nothing in section 1227 purports to limit the contents of a debtor's plan, which is the province of section 1222. In turn,

nothing in section 1222 restricts the contents of a plan to the treatment of the claims of "creditors" holding pre-petition claims. On the contrary, section 1222 expressly contemplates the treatment of post-petition claims. More important, nothing in section 1227 purports to limit the scope of the discharge under section 1228. Indeed, as is relevant here, section 1228(a) expressly discharges debts "allowed under section 503 of this title" (i.e., all administrative expense claims). *Id.* § 1228(a).

The effect of a discharge under section 1228 is specified in section 524. *Id.* § 524. This section is also not limited to the claims of "creditors" holding pre-petition claims. Rather, it clearly provides that a discharge under section . . . 1228 operates to void the "personal liability of the debtor" with respect to "any debt discharged under section . . . 1228." *Id.* § 524(a)(1). These terms plainly encompass the IRS's claim in this case.

4. Nothing in section 1399 of the IRC changes the operation of section 1222(a)(2)(A) or 1228.

As noted, section 1399 provides that "no separate taxable entity shall result from the commencement of a case" under the Bankruptcy Code "[e]xcept any case to which section 1398 applies." 26 U.S.C. § 1399. Nothing in this section alters the effect of section 1222(a)(2)(A).

The mere fact that the filing of a chapter 12 case does not trigger the creation of a "separate taxable entity" for purposes of the IRC does not mean that, for purposes of the Bankruptcy Code, the IRS's claim cannot be an administrative obligation. It simply means that the estate and the debtor are treated as a consolidated entity such that whatever tax liabilities may arise during the course of a bankruptcy case will be treated as an obligation of the debtor and the estate in combination.

In addition, nothing in section 1399 even remotely purports to alter the discharge provisions of section 1228. Critically, regardless of how the IRS wishes to characterize its post-petition claim, it remains a "debt" that the Halls may "provide for" in their plan and discharge.

At bottom, the IRS seeks to create an exception to the Code's discharge provisions through a creative interpretation of section 1399. That is not legitimate. When Congress wishes to create exceptions to the discharge and other provisions of bankruptcy relief, it knows how to do so and does so expressly. *See NextWave*, 537 U.S. at 302; *Kovacs*, 469 U.S. at 279; *Toibb v. Radloff*, 501 U.S. 157, 161 (1991). The IRS's invocation of section 1399 falls far wide of the mark.

This Court's decision in *Ohio v. Kovacs* is particularly analogous. There, the State of Ohio

obtained a state court injunction ordering Kovacs to clean up a hazardous waste disposal site. 469 U.S. at 275. Kovacs filed a bankruptcy petition, and the State sought a declaration that Kovacs's clean-up obligation was not dischargeable in bankruptcy because it was not a "debt" or "claim." *Id.* at 277. The Court noted that section 523(a) listed nine types of debt saved from discharge and that Ohio's claim was not among the exceptions. *Id.* at 278. Ohio argued that its claim was not really a "claim" for bankruptcy purposes because Ohio sought specific performance rather than money damages. Rejecting this argument, the Court observed that "it is apparent that Congress desired a broad definition of a 'claim'" and could have restricted the concept if it had wanted to do so. *Id.* Ultimately, the Court declined to accept Ohio's argument and infer another exception to the discharge. *Id.* Like Ohio's ill-fated argument in *Kovacs*, the IRS's position in this case devolves into a convoluted request for an exception to the clear language of section 1222(a)(2)(A) and 1228 that this Court should properly decline.

The Court should likewise reject the IRS's argument in this case for yet another reason: in contrast to section 1399, section 1222(a)(2)(A) is the more precise and more recent enactment directed specifically to the issue at hand. As this Court has explained, "a specific policy embodied in a later federal statute should control [this Court's] construction of the [earlier] statute,

even though it ha[s] not been expressly amended." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)). This is so because the "'classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)). As explained more fully below, it is clear that section 1222(a)(2)(A) was intended to provide the specific relief Petitioners seek in this case. To the extent of any conflict between section 1399 and 1222(a)(2)(A), the more precise and focused purpose of section 1222(a)(2)(A) should control.

5. If accepted, the Ninth Circuit's interpretation of section 1399 would mean that the IRS cannot collect post-petition taxes in non-individual chapter 7 and chapter 11 cases.

The Ninth Circuit's theory likewise makes a hash of the Code because treating the IRS's claim as an obligation of the debtor outside the bankruptcy process would divest the IRS of any realistic payment entitlement in most cases involving corporate chapter 7 and 11 liquidation cases.

For example, in a corporate chapter 7 case, the debtor is divested of all of its property so the property can be liquidated and the proceeds distributed to creditors; nothing is left with the debtor, which generally dissolves under state law when the bankruptcy case ends. Thus, under the Ninth Circuit's theory, treating the IRS's claim for post-petition taxes as an obligation of the debtor means that the tax will never be paid because the corporate chapter 7 debtor is not a surviving entity and will have no funds to pay it.

The same result would occur in a liquidating corporate chapter 11 case. Chapter 11 permits corporate debtors to liquidate their assets, either through sales during the course of the case or under the terms of a confirmed plan. 11 U.S.C. §§ 363 (providing for the sales of assets during the course of a case), 1123(b)(4) (stating that a chapter 11 plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds among holders of claims or interests"). As in a corporate chapter 7 case, the debtor in a liquidating chapter 11 case is not a surviving entity and will not have any funds to pay the IRS's post-petition claim.

In her concurrence in *Kovacs*, Justice O'Connor discussed this very type of problem. She noted that "[t]he Court's holding that the cleanup order was a 'claim' within the meaning of § 101(4) also avoids potentially adverse conse-

quences for a State's enforcement of its order when the debtor is a corporation." 469 U.S. at 286 (O'Connor, J., concurring). She explained that "[i]n a Chapter 7 proceeding under the Bankruptcy Code, a corporate debtor transfers its property to a trustee for distribution among the creditors who hold cognizable claims, and then generally dissolves under state law. Because the corporation usually ceases to exist, it has no postbankruptcy earnings that could be utilized by the State to fulfill the cleanup order. The State's only recourse in such a situation may well be its 'claim' to the prebankruptcy assets." *Id.* That observation applies here with equal force.

As many courts of appeals have held, the law takes the much more sensible position that post-petition taxes are entitled to administrative priority. *E.g., In re Pac.-Atl. Trading Co.*, 64 F.3d 1292, 1301 (9th Cir. 1995) ("Because the estate was in existence [when the tax was incurred], we conclude that the corporate income taxes . . . were 'incurred by the estate.'"); *In re L.J. O'Neill Shoe Co.*, 64 F.3d 1146, 1148 (8th Cir. 1995) (affording administrative expense priority to corporate income tax based on income earned post-petition); *In re Columbia Gas Transmission Corp.*, 37 F.3d 982, 986 (3d Cir. 1994) (declining to afford administrative expense priority where "the event giving rise to the property tax . . . occurred before the petition for bankruptcy had been filed."); *United States v.*

Friendship College, Inc., 737 F.2d 430, 432 (4th Cir. 1984) (affording administrative expense priority for income tax withheld from wages earned while conducting business in Chapter 11 reorganization). The IRS's position here is at war with these precedents and should be rejected.

B. The IRS's Position Conflicts with the Historical Treatment of Post-Petition Tax Claims in Bankruptcy.

It is axiomatic that "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate,'" *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)), and that the Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen*, 523 U.S. at 221 (quoting *Davenport*, 495 U.S. at 563); *see also United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 221 (1996); *Davenport*, 495 U.S. at 565 (O'Connor, J., dissenting) ("This Court carefully has set forth a method for statutory analysis of the Bankruptcy Code. . . . To determine the drafters' intent, the Court presumes that Congress intended to keep continuity between pre-Code judicial practice and the enactment of the Bankruptcy Code in 1978.") (citations omitted); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) ("To fix the meaning of these

provisions [of the Bankruptcy Act] there is need to keep in view the background of their history."). Consistent with this principle, the Court has held that, in construing the provisions of the Bankruptcy Code, it will not presume that Congress intended to overturn an established bankruptcy practice *sub silentio*, but instead will require any intent to change the law to be "unmistakably clear." *Cohen*, 523 U.S. at 222.

This rule makes sense. The Bankruptcy Code is a complex codification of equitable principles developed over the past two centuries largely in response to experience in the administration of insolvency proceedings. In drafting the Code, Congress relied repeatedly on preexisting judicial doctrine and reference to existing practice both to fill out and to inform the Code's essential meaning. The Court's interpretive methodology presumes the continuance of preexisting bankruptcy practices. Of course, Congress may alter or abrogate preexisting legal procedures as it pleases, even those of longstanding importance and duration (except as the Constitution commands otherwise), but as the cases cited above demonstrate, the abrogation of preexisting bankruptcy doctrine requires proof of clear and unmistakable disavowal, not simply oblique inferences of implicit repeal.

Claims of the United States have long enjoyed priority in bankruptcy. The Act of 1800 gave preferred treatment to debts due the Unit-

ed States, Act of Apr. 4, 1800, ch. 19, §§ 29, 62, 2 Stat. 19, 29, 36 (repealed 1803), as did the Act of 1841, Act of Aug. 19, 1841, ch. 9, §§ 5, 6, 5 Stat. 440, 444-46 (repealed 1843).

The Act of 1867 defined five classes of claims entitled to priority payment, including administrative expenses and taxes due the United States. Act of Mar. 2, 1867, ch. 176, §§ 27, 28, 14 Stat. 517, 529-531 (repealed 1878). This basic priority scheme was carried over to the 1898 Bankruptcy Act.

As originally passed, section 64 of the 1898 Act divided priority into two subsections – 64a and 64b. Act of July 1, 1898, ch. 541, § 64, 30 Stat. 544, 563 (repealed 1979). Section 64a covered "all taxes legally due and owing by the bankrupt to the United States." *Id.* § 64a. Section 64b set out certain preferred debts, granting first priority to "the actual and necessary cost of preserving the estate subsequent to filing the petition." *Id.* § 64b. Section 64a directed, however, that "[t]he court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States . . . in advance of the payment of dividends to creditors." *Id.* § 64a. This particular clause generated an "immense amount of litigation" centered on the relative priority afforded tax claims in the growing number of cases where the estate was not large enough to pay in full all priority debts. Ralph F. Colin, *The Priority of the United States in the Payment of Its*

Claims Against a Bankrupt, 24 COLUM. L. REV. 360, 360 (1924). Ultimately, the clause came to be "regarded as clearly giving the payment of taxes priority over wage claims and even the expenses of administration." 6 REMINGTON ON BANKRUPTCY § 2808 (5th ed. 1952); *see also In re West Coast Rubber Co.*, 268 U.S. 1, 4 (1925).

In 1926, Congress amended section 64 further, Act of May 27, 1926, ch. 406, § 15, 44 Stat. 662, 666-67 (repealed 1979), and in 1938, the Chandler Act reworded the section by merging subsections 64a and 64b, Act of June 22, 1938, ch. 575, 52 Stat. 840, 874 (repealed 1979). As amended, section 64a gave first priority to "the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition." *Id.* Fourth priority was given to "taxes legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof." *Id.* Following that amendment, no substantive changes of relevance were made to section 64.

In 1966, this Court held that section 64a(1) conferred first priority to post-petition taxes. *Nicholas*, 384 U.S. at 687-88. In *Nicholas*, the Court addressed the manner in which interest on claims for unpaid income, social security, and excise taxes should be calculated in a Chapter XI proceeding. *Id.* at 686. In the course of its decision, the Court determined that post-petition taxes are properly administrative ex-

penses: "Taxes incurred in the pre-arrangement [i.e., pre-petition] period must be content with a fourth priority under s 64a(4) of the Bankruptcy Act. On the other hand, taxes incurred during the arrangement period [*i.e.*, post-petition] are expenses of the Chapter XI proceedings and are therefore technically a part of the first priority under s 64a(1)." *Id.* at 687-88.

Following *Nicholas*, "it was well established that administrative status and the attendant first priority of distribution under Section 64a(1) applied to *any* post-petition expenses, including taxes of *any* kind, so long as the claimant demonstrated that such expenses were reasonable and necessary for the preservation of the bankruptcy estate." *In re Lumara Foods of America, Inc.*, 50 B.R. 809, 813 (N.D. Ohio 1985) (emphasis in original); *see also In re Mark Anthony Constr., Inc.*, 886 F.2d 1101, 1106 (9th Cir. 1989) (holding that interest accruing on unpaid post-petition taxes should be given priority as an administrative expense) ("the specific common law rule laid down in *Nicholas* survives the enactment of the Code and allows interest accruing on unpaid post-petition taxes to be given first priority as an administrative expense."); 6 REMINGTON ON BANKRUPTCY § 2822 (5th ed. 1952) ("If the trustee conducts the bankrupt's business, any taxes paid or incurred in the course of doing so are administration expenses."). Indeed, following *Nicholas*, courts (including this Court) repeatedly held that taxes assessed after

a petition for bankruptcy was filed were administrative expenses under section 64a(1) rather than taxes "due and owing by the bankrupt" under section 64a(4). *See, e.g., In re Luster*, 981 F.2d 277, 280-81 (7th Cir. 1992); *In re Lambertville Rubber Co.*, 111 F.2d 45, 49 (3d Cir. 1940); 3A COLLIER ON BANKRUPTCY ¶ 64.401, at 2151 (14th ed. 1975) ("Taxes accruing after bankruptcy are a cost of administration and entitled to a first priority.").[2]

There is no evidence – let alone evidence that is "unmistakably clear" – that Congress intended to change this historic practice, either when it enacted the Bankruptcy Code in 1978, when it subsequently enacted section 1399 of the IRC, or when it enacted section 1222(a)(2)(A) of the Bankruptcy Code in 2005. Accordingly, the Court should conclude that the historic practice endures.

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[2] *See also Haggerty v. Michigan Trust Co.*, 286 U.S. 334, 344 (1932) (post-petition franchise taxes were expenses of administration); *In re John Horne Co.*, 220 F.2d 33, 34-35 (7th Cir. 1955) (claims for federal unemployment and income taxes that accrued prior to filing petition are "taxes" under § 64a(4) and those accruing after filing are costs of administration under § 64a(1)); *McColgan v. Maier Brewing Co.*, 134 F.2d 385, 387 (9th Cir. 1943); *In re Fonda*, 126 F.2d 604 (2d Cir. 1942); *Missouri v. Earhart*, 111 F.2d 992, 995 (8th Cir. 1940); *In re R.M. Rose Co.*, 285 F. 685, 689 (6th Cir. 1923).

C. The Legislative History to Sections 1222(a)(2)(A) and 503(b) Demonstrate Congress's Intent to Reduce the Priority of Claims for Taxes Incurred During the Chapter 12 Reorganization Process to Enable Family Farmers to Successfully Reorganize.

Chapter 12 was "designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land." H.R. REP. NO. 99-958, at 48 (1986). When Congress added chapter 12 to the Bankruptcy Code in 1986, it included a seven-year sunset provision because chapter 12 was "a new chapter aimed at a specific class of debtors," and Congress wanted to "evaluate both whether the chapter [was] serving its purpose and whether there [was] a continuing need for a special chapter for the family farmer" before determining "whether or not to make th[e] chapter permanent." *Id.* Following its original enactment, Congress extended chapter 12's expiration date numerous times and ultimately made the chapter permanent in the 2005 amendment to the Bankruptcy Code known as the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). 147 CONG. REC. H4953 (daily ed. July 31, 2001) (statement of Rep. Baldwin); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1001(a), 119 Stat. 23, 185 (2005).

As part of its permanent addition of chapter 12 to the Bankruptcy Code, Congress enacted section 1222(a)(2)(A) to help farmers "reorganize by keeping the tax collectors at bay." 145 CONG. REC. S764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley). Prior to the enactment of BAPCPA, tax claims by the IRS were afforded special priority, and former section 1222(a)(2) required that any chapter 12 plan had to pay those claims in full. 11 U.S.C. § 1222(a)(2) (2004) ("The plan shall . . . provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim."). As a result, the IRS would often have an effective veto over a chapter 12 debtor's plan of reorganization.

Senator Grassley, the original proponent of section 1222(a)(2)(A) and ultimately the primary sponsor of BAPCPA, sought to change that dynamic by amending section 1222(a)(2) to reduce the priority of claims owed to governmental entities as a result of the sale of certain assets during a chapter 12 bankruptcy reorganization in order to "free up capital for investment in the farm, and help farmers stay in the business of farming." 145 CONG. REC. S764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley); *see also In re Knudsen*, 389 B.R. 643, 660 (N.D. Iowa 2008); 7 NORTON BANKRUPTCY LAW & PRACTICE § 133:6 n.2 (3d ed. 2010). This theme of reducing

the tax effect of sales during reorganization in order to free up capital for the reorganization process was forcefully and consistently emphasized by Senator Grassley from the moment he initially proposed the language that became section 1222(a)(2)(A) to the moment he saw his proposed legislation become a reality.

Senator Grassley's proposal originated in 1997 in response to a particular case: *In re Specht*, No. 96-21022-D (N.D. Iowa April 9, 1997). In *Specht*, the court determined that the debtor's proposed post-petition deeding of 80 acres would lead to taxable income that ultimately undermined the feasibility of the debtor's chapter 12 plan. *See* Appellants' Br. at 12-13, *In re Knudsen*, 389 B.R. 643 (N.D. Iowa 2008) (No. C07-3011-MWB). A lawyer involved in the case brought the decision to Senator Grassley's attention. *Id.* at 13; *see also* 145 CONG. REC. S764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley) (acknowledging that lawyer). In response, on January 20, 1999, Senator Grassley introduced a bill entitled the "Safeguarding America's Farms Entering the Year 2000 Act," known as the "Safety 2000" Act. The relevant text of that proposed act, reproduced at Stat. App. 16a, is effectively identical to the language of section 1222(a)(2)(A). *Compare* S. 260, 106th Cong. § 3 (1999); Stat. App. 16a *with* 11 U.S.C. § 1222(a)(2)(A); Stat. App. 5a. Senator Grassley explained the origin and purpose of his proposal as follows:

> "Safety 2000" also helps farmers to reorganize by keeping the tax collectors at bay. Under current law, farmers often face a crushing tax liability if they need to sell livestock or land in order to reorganize their business affairs. . . . [H]igh taxes have caused farmers to lose their farms. Under the bankruptcy code, the I.R.S. must be paid in full for any tax liabilities *generated during a bankruptcy reorganization*. If the farmer can't pay the I.R.S. in full, then he can't keep his farm. This isn't sound policy. Why should the I.R.S. be allowed to veto a farmer's reorganization plan? "Safety 2000" takes this power away from the I.R.S. *by reducing the priority of taxes during proceedings*. This will free up capital for investment in the farm, and help farmers stay in the business of farming.

145 CONG. REC. S727, 764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley) (emphasis added).

Although the Safety 2000 Act was not ultimately passed as a stand-alone bill, its provisions were incorporated in other bills, including ultimately BAPCPA. For example, on February 24, 1999, the relevant text was included in H.R. 833, introduced in the House as the Bankruptcy Reform Act of 1999. *See* H.R. 833, 106th Cong. § 1004 (1999); Stat. App. 16a-17a. On March 16,

1999, Senator Grassley incorporated the language into S. 625, introduced in the Senate also as the Bankruptcy Reform Act of 1999. *See* 145 CONG. REC. S2738, 2764 (daily ed. Mar. 16, 1999); S. 625, 106th Cong. § 1004 (1999); Stat. App. 17a. When discussing the proposed bill, Senator Grassley explained that the proposed revision to chapter 12 that ultimately became section 1222(a)(2)(A) would "reduce[] the priority of capital gains tax liabilities for farm assets *sold as part of a reorganization plan*. . . [in order to] allow[] cash-strapped farmers to sell livestock, grain, and other farm assets to generate cash flow when liquidity is essential to maintaining a family farm operation." 145 CONG. REC. S11093 (daily ed. Sept. 21, 1999) (statement of Sen. Grassley); *see also id.* (letter of Senators Grassley, Johnson, Brownback, Kerrey, and Daschle entered into the record) (same); 145 CONG. REC. S14052, 14055 (daily ed. Nov. 5, 1999) (statement of Sen. Grassley) (same).

The House ultimately passed H.R. 833 and sent it to the Senate for consideration. 145 CONG. REC. H2771 (daily ed. May 5, 1999); Stat. App. 18a. The Senate then essentially passed S. 625 by replacing the text of H.R. 833 with the text of S. 625 and requested a conference with the House. 146 CONG. REC. S255 (daily ed. Feb. 2, 2000). Although there were significant differences between the two chambers' bills, they were virtually identical with respect to what eventually became section 1222(a)(2)(A). *Compare* S. 625,

106th Cong. § 1004 (1999); Stat. App. 17a *with* H.R. 833, 106th Cong. § 201 (1999); Stat. App. 18a. As Senator Grassley explained, there was no conflict on this provision because both "the House and Senate agreed to reduce the priority of capital gains tax liabilities for farm assets sold *as a part of a chapter 12 reorganization plan.*" 146 CONG. REC. S6249 (daily ed. June 30, 2000) (statement of Sen. Grassley) (emphasis added); *see also* 146 CONG. REC. S5384 (daily ed. June 20, 2000) (statement of Sen. Grassley) ("The bicameral agreement broadens the definition of 'family farmer' and permits farmers *in chapter 12* to avoid crushing capital gains taxes *when selling farm assets to generate cash flow.*") (emphases added).

H.R. 833 was not ultimately enacted, but Senator Grassley later reintroduced the legislation (with the relevant section again included) as the Bankruptcy Reform Act of 2000. *See* S. 3186, 106th Cong. § 1003 (2000); Stat. App. 18a-19a. Senator Grassley again emphasized the significance of the tax relief to be provided by changes to chapter 12 for farmers undergoing reorganization. *See* 146 CONG. REC. S10775 (daily ed. Oct. 19, 2000) (statement of Sen. Grassley) ("this conference report gives farmers *in chapter 12* much-needed capital gains tax relief.") (emphasis added); 146 CONG. REC. S11413 (daily ed. Oct. 31, 2000) (statement of Sen. Grassley) ("The bankruptcy bill lets farmers *in bankruptcy* avoid capital gains taxes. This will free up resources that

would have otherwise been forced to go to the Federal Treasury, that would otherwise go down the black hole of the IRS, to be invested in farming operations.") (emphasis added); 146 CONG. REC. S11632 (daily ed. Dec. 6, 2000) (statement of Sen. Grassley) ("*we have also changed the tax laws so that farmers will be able to avoid capital gains taxes when they are forced to sell something by the referee of bankruptcy.* This will free up resources then to be invested in a farming operation that would otherwise go down the black hole of the IRS.") (emphasis added). Congress passed that legislation, but it was ultimately pocket vetoed by then-President Clinton. *See* 146 CONG. REC. H9817, 9840 (daily ed. Oct. 12, 2000); 146 CONG. REC. S11663, 11730 (daily ed. Dec. 7, 2000).

Following the 2000 election, on January 30, 2001, Senator Grassley introduced the Bankruptcy Reform Act of 2001, once again including the language ultimately incorporated in the current section 1222(a)(2)(A). *See* S. 220, 107th Cong. § 1003 (2001); Stat. App. 19a-20a; S. 420, 107th Cong. § 1003 (2001); Stat. App. 20a. In a Senate hearing on that bill, he provided a written statement that the relevant language was intended to provide relief from the capital gains tax burden related to assets "sold as part of a reorganization plan." *The Bankruptcy Reform Act of 2001: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 121 (2001) ("S. 220 also reduces the priority of capital gains tax liabilities

for farm assets sold as a part of a reorganization plan, which will allow cash-strapped farmers to sell livestock, grain, and other farm assets to generate cash flow when liquidity is essential to maintaining a family farm operation.") (emphasis added); *see also* 147 CONG. REC. S1808 (daily ed. Mar. 5, 2001) (statement of Sen. Grassley) ("The bill lets farmers *in bankruptcy* avoid capital gains taxes.") (emphasis added). Senator Grassley's view of the bill was also adopted by Senator Collins, who successfully amended the bill to expand access to chapter 12 to certain fishermen as well as family farmers. 147 CONG. REC. S2357-58 (daily ed. Mar. 15, 2001). Senator Collins explained that "[t]he chapter 12 debtor is . . . given the freedom to sell off parts of his or her property *as part of a reorganization plan*." 147 CONG. REC. S2155 (daily ed. Mar. 12, 2001) (statement of Sen. Collins) (emphasis added). That Act was ultimately passed by the Senate but never became law. *See* 147 CONG. REC. S2379 (daily ed. Mar. 15, 2001). Senator Collins's amendment was nevertheless incorporated into the final enactment of BAPCPA.

With BAPCPA, Senator Grassley was ultimately successful in getting his language enacted. *Compare* S. 260, 106th Cong. § 3 (1999); Stat. App. 16a *with* 11 U.S.C. § 1222(a)(2)(A); Stat. App. 5a. Prior to final passage, he spoke as the sponsor in support of the BAPCPA and echoed his earlier comments, reiterating the importance of the bill's provision to

"let[] farmers *in bankruptcy* avoid capital gains tax. . . [which] is very important because it will free up resources to be invested in farming operations. . . ." 151 CONG. REC. S1857 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley) (emphasis added).

The legislative history behind section 1222(a)(2)(A) demonstrates a remarkably clear intent to reduce the priority of tax claims incurred post-petition to enable family farmers to successfully reorganize their affairs in a Chapter 12 bankruptcy. The decision of the court below is clearly at odds with this intent.

In addition, the legislative history of section 503(b) of the Bankruptcy Code further undermines the decision below. The Senate Reports discussing this provision referred to administrative expenses under section 503(b)(2) as including taxes incurred "*in administering the debtor's estate*" or "*during the case.*" S. REP. NO. 95-989, at 66 (1978) (emphases added); *see also Knudsen*, 581 F.3d at 708-09. These statements necessarily contemplate post-petition tax claims, just as Senator Grassley's comments did. They also reflect the established historical view regarding the treatment of post-petition tax claims as administrative expenses, further contradicting the analysis of the court below.

CONCLUSION

For the foregoing reasons, and the reasons contained in Petitioners' brief, the decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

11 U.S.C. § 503(b)(1)(B)(i): Allowance of administrative expenses

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1) . . . (B) any tax--

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title;

11 U.S.C. §§ 507(a)(2), 507(a)(8): Priorities

(a) The following expenses and claims have priority in the following order:

***

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

***

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of--

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on--

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise--

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection

action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

11 U.S.C. § 1222(a)(2)(A): Contents of plan

(a) The plan shall--

***

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless--

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

26 U.S.C. § 1398: Rules relating to individuals' Title 11 cases

(a) Cases to which section applies.--Except as provided in subsection (b), this section shall apply to any case under chapter 7 (relating to li-

quidations) or chapter 11 (relating to reorganizations) of Title 11 of the United States Code in which the debtor is an individual.

(b) Exceptions where case is dismissed, etc.--

(1) Section does not apply where case is dismissed.--This section shall not apply if the case under chapter 7 or 11 of Title 11 of the United States Code is dismissed.

(2) Section does not apply at partnership level.--For purposes of subsection (a), a partnership shall not be treated as an individual, but the interest in a partnership of a debtor who is an individual shall be taken into account under this section in the same manner as any other interest of the debtor.

(c) Computation and payment of tax; basic standard deduction.--

(1) Computation and payment of tax.--Except as otherwise provided in this section, the taxable income of the estate shall be computed in the same manner as for an individual. The tax shall be computed on such taxable income and shall be paid by the trustee.

(2) Tax rates.--The tax on the taxable income of the estate shall be determined under subsection (d) of section 1.

(3) Basic standard deduction.--In the case of an estate which does not itemize deductions, the basic standard deduction for the estate for the taxable year shall be the same as for a married individual filing a separate return for such year.

(d) Taxable year of debtors.--

(1) General rule.--Except as provided in paragraph (2), the taxable year of the debtor shall be determined without regard to the case under Title 11 of the United States Code to which this section applies.

(2) Election to terminate debtor's year when case commences.--

(A) In general.--Notwithstanding section 442, the debtor may (without the approval of the Secretary) elect to treat the debtor's taxable year which includes the commencement date as 2 taxable years--

(i) the first of which ends on the day before the commencement date, and

(ii) the second of which begins on the commencement date.

(B) Spouse may join in election.--In the case of a married individual (within the meaning of section 7703), the spouse may elect to have the debtor's election under subparagraph (A) also apply to the spouse, but only if the debtor and the spouse file a joint return for the taxable year referred to in subparagraph (A)(i).

(C) No election where debtor has no assets.--No election may be made under subparagraph (A) by a debtor who has no assets other than property which the debtor may treat as exempt property under section 522 of Title 11 of the United States Code.

(D) Time for making election.--An election under subparagraph (A) or (B) may be made only on or before the due date for filing the return for the taxable year referred to in subparagraph (A)(i). Any such election, once made, shall be irrevocable.

(E) Returns.--A return shall be made for each of the taxable years specified in subparagraph (A).

(F) Annualization.--For purposes of subsections (b), (c), and (d) of section 443, a return filed for either of the taxable years referred to in subpa-

ragraph (A) shall be treated as a return made under paragraph (1) of subsection (a) of section 443.

(3) Commencement date defined.--For purposes of this subsection, the term "commencement date" means the day on which the case under Title 11 of the United States Code to which this section applies commences.

(e) Treatment of income, deductions, and credits.--

(1) Estate's share of debtor's income.--The gross income of the estate for each taxable year shall include the gross income of the debtor to which the estate is entitled under Title 11 of the United States Code. The preceding sentence shall not apply to any amount received or accrued by the debtor before the commencement date (as defined in subsection (d)(3)).

(2) Debtor's share of debtor's income.--The gross income of the debtor for any taxable year shall not include any item to the extent that such item is included in the gross income of the estate by reason of paragraph (1).

(3) Rule for making determinations with respect to deductions, credits, and employment taxes.--Except as otherwise provided in this section, the

determination of whether or not any amount paid or incurred by the estate--

(A) is allowable as a deduction or credit under this chapter, or

(B) is wages for purposes of subtitle C,

shall be made as if the amount were paid or incurred by the debtor and as if the debtor were still engaged in the trades and businesses, and in the activities, the debtor was engaged in before the commencement of the case.

(f) Treatment of transfers between debtor and estate.--

(1) Transfer to estate not treated as disposition.--A transfer (other than by sale or exchange) of an asset from the debtor to the estate shall not be treated as a disposition for purposes of any provision of this title assigning tax consequences to a disposition, and the estate shall be treated as the debtor would be treated with respect to such asset.

(2) Transfer from estate to debtor not treated as disposition.--In the case of a termination of the estate, a transfer (other than by sale or exchange) of an asset from the estate to the debtor shall not be treated as a disposition for purposes

of any provision of this title assigning tax consequences to a disposition, and the debtor shall be treated as the estate would be treated with respect to such asset.

(g) Estate succeeds to tax attributes of debtor.--The estate shall succeed to and take into account the following items (determined as of the first day of the debtor's taxable year in which the case commences) of the debtor--

(1) Net operating loss carryovers.--The net operating loss carryovers determined under section 172.

(2) Charitable contributions carryovers.--The carryover of excess charitable contributions determined under section 170(d)(1).

(3) Recovery of tax benefit items.--Any amount to which section 111 (relating to recovery of tax benefit items) applies.

(4) Credit carryovers, etc.--The carryovers of any credit, and all other items which, but for the commencement of the case, would be required to be taken into account by the debtor with respect to any credit.

(5) Capital loss carryovers.--The capital loss carryover determined under section 1212.

(6) Basis, holding period, and character of assets.--In the case of any asset acquired (other than by sale or exchange) by the estate from the debtor, the basis, holding period, and character it had in the hands of the debtor.

(7) Method of accounting.--The method of accounting used by the debtor.

(8) Other attributes.--Other tax attributes of the debtor, to the extent provided in regulations prescribed by the Secretary as necessary or appropriate to carry out the purposes of this section.

(h) Administration, liquidation, and reorganization expenses; carryovers and carrybacks of certain excess expenses.--

(1) Administration, liquidation, and reorganization expenses.--Any administrative expense allowed under section 503 of Title 11 of the United States Code, and any fee or charge assessed against the estate under chapter 123 of Title 28 of the United States Code, to the extent not disallowed under any other provision of this title, shall be allowed as a deduction.

(2) Carryback and carryover of excess administrative costs, etc., to estate taxable years.--

(A) Deduction allowed.--There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (i) the administrative expense carryovers to such year, plus (ii) the administrative expense carrybacks to such year.

(B) Administrative expense loss, etc.--If a net operating loss would be created or increased for any estate taxable year if section 172(c) were applied without the modification contained in paragraph (4) of section 172(d), then the amount of the net operating loss so created (or the amount of the increase in the net operating loss) shall be an administrative expense loss for such taxable year which shall be an administrative expense carryback to each of the 3 preceding taxable years and an administrative expense carryover to each of the 7 succeeding taxable years.

(C) Determination of amount carried to each taxable year.--The portion of any administrative expense loss which may be carried to any other taxable year shall be determined under section 172(b)(2), except that for each taxable year the computation under section 172(b)(2) with respect to the net operating loss shall be made before the computation under this paragraph.

(D) Administrative expense deductions allowed only to estate.--The deductions allowable under this chapter solely by reason of paragraph (1),

and the deduction provided by subparagraph (A) of this paragraph, shall be allowable only to the estate.

(i) Debtor succeeds to tax attributes of estate.--In the case of a termination of an estate, the debtor shall succeed to and take into account the items referred to in paragraphs (1), (2), (3), (4), (5), and (6) of subsection (g) in a manner similar to that provided in such paragraphs (but taking into account that the transfer is from the estate to the debtor instead of from the debtor to the estate). In addition, the debtor shall succeed to and take into account the other tax attributes of the estate, to the extent provided in regulations prescribed by the Secretary as necessary or appropriate to carry out the purposes of this section.

(j) Other special rules.--

(1) Change of accounting period without approval.--Notwithstanding section 442, the estate may change its annual accounting period one time without the approval of the Secretary.

(2) Treatment of certain carrybacks.--

(A) Carrybacks from estate.--If any carryback year of the estate is a taxable year before the estate's first taxable year, the carryback to such carryback year shall be taken into account for

the debtor's taxable year corresponding to the carryback year.

(B) Carrybacks from debtor's activities.--The debtor may not carry back to a taxable year before the debtor's taxable year in which the case commences any carryback from a taxable year ending after the case commences.

(C) Carryback and carryback year defined.--For purposes of this paragraph--

(i) Carryback.--The term "carryback" means a net operating loss carryback under section 172 or a carryback of any credit provided by part IV of subchapter A.

(ii) Carryback year.--The term "carryback year" means the taxable year to which a carryback is carried.

26 U.S.C. § 1399: No separate taxable entities for partnerships, corporations, etc.

Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under Title 11 of the United States Code.

S. 260, 106th Cong. § 3 (1999): CONTENTS OF PLAN – AMEND

Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

'(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

'(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

H.R. 833, 106th Cong. § 1004 (1999): CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) Contents of Plan. Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

"(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

"(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

S. 625, 106th Cong. § 1004 (1999): CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) CONTENTS OF PLAN- AMEND Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

'(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—

'(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

H.R. 833, 106th Cong. § 201 (1999):[1]

(b) CONTENTS OF CHAPTER 12 PLAN - *Section 1222(a)(2) of title 11, United States Code*, is amended to read as follows:

"(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

"(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

S. 3186, 106th Cong. § 1003 (2000):
CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) CONTENTS OF PLAN - Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

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[1] As passed by the House of Representatives on May 5, 1999.

"(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—

"(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

S. 220, 107th Cong. § 1003 (2001): CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) Contents of Plan - Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

"(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

"(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under sec-

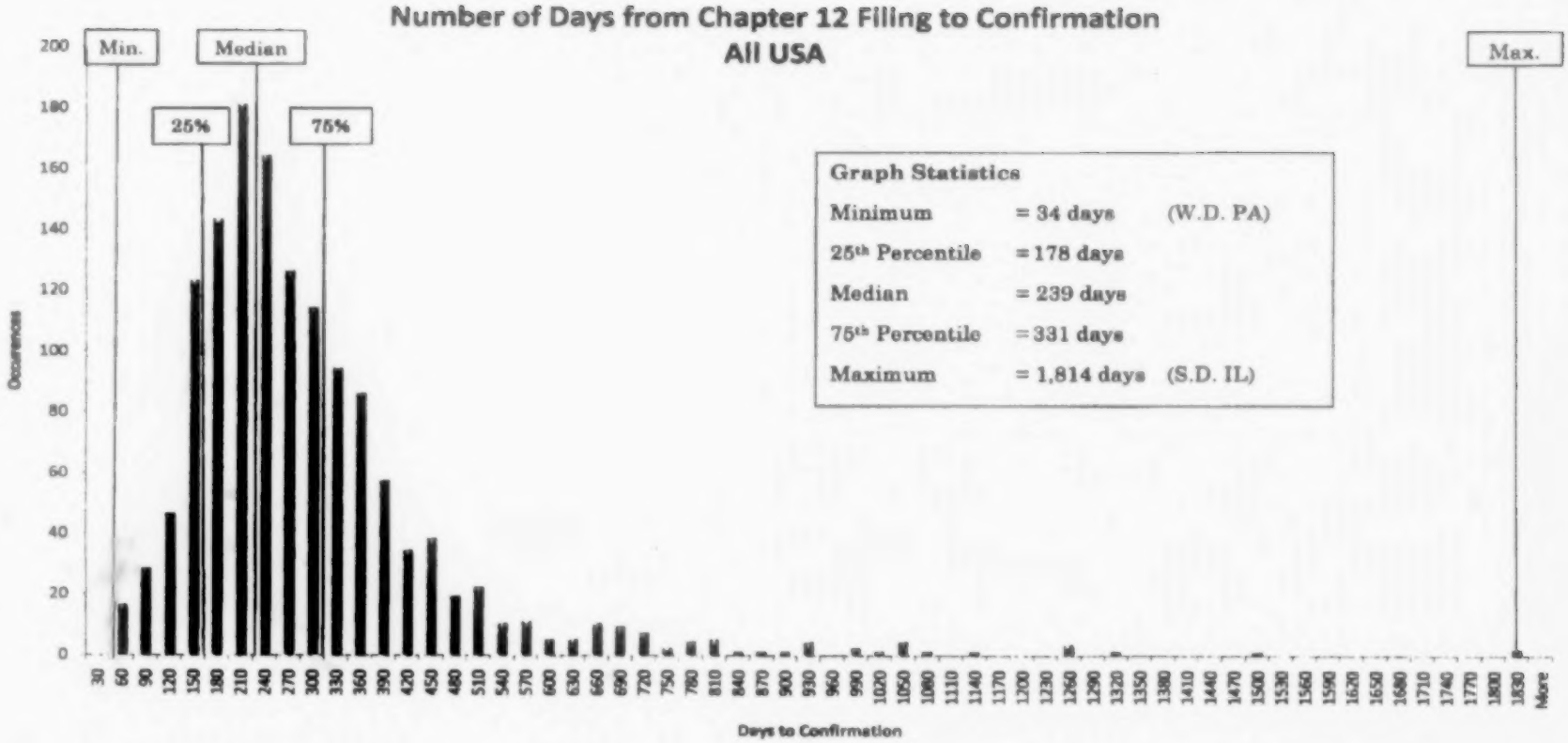
tion 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

S. 420, 107th Cong. § 1003 (2001): CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) CONTENTS OF PLAN - Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

"(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

"(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;


Number of Days from Chapter 12 Filing to Confirmation
All USA
Min.
Median
25%
75%
Max.
Graph Statistics
Minimum = 34 days (W.D. PA)
25th Percentile = 178 days
Median = 239 days
75th Percentile = 331 days
Maximum = 1,814 days (S.D. IL)
Occurrences
Days to Confirmation

National Survey of Chapter 12 Cases Filed April 20, 2005 Through July 31, 2011

Circuit and District	# of Cases	# Of Individual Cases	# Of Entity Cases	# Confirmed	# Dismissed	# Pending	Other Disposition	Ave. Days to Conf.	Median Days to Conf.	Average Tax Years to Conf.	Median Tax Yrs to Conf.	Low Doc. # Conf.	High Doc. # Conf.	# Conf. Order Docket >= 50	% Doc. # Conf. Order >= 50
Total	**2,682**	**2,266**	**416**	**1,382**	**720**	**465**	**112**	**280**	**239**	**1.77**	**2**	**9**	**615**	**907**	**65.63%**
DC	**0**	**0**	**0**	**0**	**0**	**0**	**0**								
1st	**225**	**211**	**14**	**90**	**71**	**54**	**10**	**272**	**226**	**1.77**	**2**	**14**	**135**	**31**	**34.44%**
ME	29	27	2	14	5	6	4	324	307	1.93	2	19	135	7	50.00%
MA	55	52	3	12	20	23	0	237	231	1.83	2	28	87	6	50.00%
NH	7	7	0	3	4	0	0	188	166	1.67	2	29	121	2	66.67%
RI	0	0	0	0	0	0	0								
PR	134	125	9	61	42	25	6	270	221	1.72	2	14	133	16	26.23%
2nd	**131**	**113**	**18**	**60**	**34**	**24**	**13**	**319**	**269**	**1.83**	**2**	**9**	**262**	**26**	**43.33%**
CT	11	7	4	4	4	3	0	243	231	1.75	2	43	88	3	75.00%
NY, N	77	68	9	31	21	14	11	337	322	1.84	2	9	262	11	35.48%
NY, E	0	0	0	0	0	0	0								
NY, S	4	2	2	0	3	1	0								
NY, W	23	21	2	14	4	3	2	411	391	2.00	2	33	169	11	78.57%
VT	16	15	1	11	2	3	0	177	167	1.64	2	13	107	1	9.09%

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3rd	**99**	**84**	**15**	**41**	**38**	**18**	**2**	**377**	**319**	**1.99**	**2**	**15**	**323**	**28**	**68.29%**
DE	9	7	2	1	7	0	1	151	151	2.00	2	87	87	1	100.00%
NJ	12	7	5	4	6	2	0	283	282	1.75	2	29	51	2	50.00%
PA, E	13	11	2	4	1	8	0	180	120	1.67	2	26	62	1	25.00%
PA, M	27	24	3	11	11	4	1	430	396	2.00	2	38	200	10	90.91%
PA, W	38	35	3	21	13	4	0	415	328	2.10	2	15	323	14	66.67%
VI	0	0	0	0	0	0	0								
4th	**110**	**98**	**12**	**64**	**28**	**18**	**0**	**240**	**189**	**1.67**	**2**	**15**	**194**	**37**	**57.81%**
MD	9	6	3	3	3	3	0	290	340	1.67	2	47	176	2	66.67%
NC, E	38	35	3	26	7	5	0	214	190	1.54	2	29	194	15	57.69%
NC, M	7	6	1	4	3	0	0	204	208	1.75	2	65	97	4	100.00%
NC, W	14	11	3	7	2	5	0	149	127	1.71	2	15	90	1	14.29%
SC	10	10	0	8	2	0	0	160	159	1.38	1	39	146	6	75.00%
VA, E	14	14	0	8	5	1	0	195	210	1.50	2	19	110	3	37.50%
VA, W	14	12	2	5	6	3	0	214	202	1.60	2	38	177	3	60.00%
WV, N	1	1	0	1	0	0	0	698	698	3.00	3	188	188	1	100.00%
WV, S	3	3	0	2	0	1	0	1,231	1,231	4.50	5	75	123	2	100.00%

National Survey of Chapter 12 Cases Filed April 20, 2005 Through July 31, 2011

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5th	**260**	**210**	**50**	**152**	**55**	**35**	**18**	**298**	**274**	**1.80**	**2**	**10**	**255**	**107**	**70.39%**
LA, E	6	2	4	5	1	0	0	422	423	2.00	2	67	89	5	100.00%
LA, M	2	2	0	0	2	0	0								
LA, W	67	53	14	36	10	9	12	300	296	1.89	2	28	125	29	80.56%
MS, N	35	28	7	20	6	9	0	357	347	2.05	2	16	254	15	75.00%
MS, S	21	19	2	14	5	0	2	541	505	2.50	3	10	255	10	71.43%
TX, N	44	38	6	26	7	8	3	216	189	1.50	2	20	192	19	73.08%
TX, E	23	17	6	16	5	2	0	237	216	1.75	2	21	114	10	62.50%
TX, S	43	35	8	26	13	3	1	239	224	1.50	1	17	108	15	57.69%
TX, W	19	16	3	9	6	4	0	228	200	1.44	1	22	131	4	44.44%
6th	**292**	**259**	**33**	**144**	**89**	**41**	**18**	**284**	**250**	**1.78**	**2**	**14**	**281**	**86**	**59.72%**
KY, E	14	13	1	9	4	1	0	236	210	1.56	2	32	118	8	88.89%
KY, W	23	20	3	9	8	5	1	236	220	1.67	2	34	104	7	77.78%
MI, E	73	61	12	30	28	8	7	339	308	1.83	2	21	223	19	63.33%
MI, W	60	48	12	34	11	10	5	244	241	1.71	2	14	132	16	47.06%
OH, N	17	16	1	13	4	0	0	393	329	2.15	2	21	281	9	69.23%
OH, S	27	25	2	15	5	6	1	271	220	1.73	2	26	110	9	60.00%
TN, E	54	54	0	24	18	9	3	242	215	1.75	2	28	135	14	58.33%
TN, M	20	18	2	10	8	1	1	329	253	1.80	2	14	189	4	40.00%
TN, W	4	4	0	0	3	1	0								

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7th	**231**	**202**	**29**	**136**	**58**	**34**	**3**	**275**	**238**	**1.71**	**2**	**20**	**615**	**102**	**75.00%**
IL, N	11	11	0	4	6	1	0	180	141	1.50	2	32	89	2	50.00%
IL, C	31	31	0	18	10	3	0	343	355	1.83	2	37	615	16	88.89%
IL, S	15	15	0	10	2	2	1	234	237	2.00	2	20	162	8	80.00%
IN, N	19	18	1	9	4	5	1	294	224	1.78	2	39	133	8	88.89%
IN, S	29	25	4	20	6	3	0	392	353	1.85	2	33	248	18	90.00%
WI, E	34	29	5	16	12	6	0	268	233	1.63	2	25	96	9	56.25%
WI, W	92	73	19	59	18	14	1	227	219	1.61	2	29	139	41	69.49%
8th	**359**	**308**	**51**	**191**	**99**	**52**	**17**	**277**	**239**	**1.77**	**2**	**22**	**238**	**115**	**60.21%**
AR, E	39	34	5	22	16	1	0	318	322	1.95	2	22	162	16	72.73%
AR, W	38	37	1	14	14	10	0	351	264	2.14	2	22	218	10	71.43%
IA, N	24	20	4	12	2	8	2	398	248	2.08	2	46	227	11	91.67%
IA, S	6	6	0	3	2	1	0	209	197	2.00	2	38	46	0	0.00%
MN	54	46	8	15	25	10	4	169	176	1.60	2	12	77	2	13.33%
MO, E	20	17	3	13	1	4	2	208	178	1.46	1	17	102	8	61.54%
MO, W	38	30	8	23	9	5	1	334	239	1.70	2	36	183	15	65.22%
NE	108	87	21	70	19	11	8	254	240	1.71	2	22	238	42	60.00%
ND	20	20	0	13	7	0	0	229	225	1.69	2	26	83	7	53.85%
SD	12	11	1	6	4	2	0	315	243	1.67	2	33	155	4	66.67%

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9th	**405**	**315**	**90**	**189**	**107**	**92**	**16**	**235**	**219**	**1.63**	**2**	**18**	**381**	**136**	**71.96%**
AK	6	6	0	2	4	0	0	228	228	2.00	2	23	66	1	50.00%
AZ	26	16	10	4	6	16	0	193	203	2.00	2	33	72	1	25.00%
CA, N	38	32	6	10	11	16	1	221	218	1.50	2	21	51	1	10.00%
CA, E	101	85	16	54	26	21	0	196	194	1.46	1	20	381	41	75.93%
CA, C	29	21	8	8	13	8	0	257	259	2.00	2	24	119	3	37.50%
CA, S	9	7	2	2	3	2	2	339	339	2.00	2	89	90	2	100.00%
HI	5	4	1	3	1	1	0	291	334	1.67	2	71	99	3	100.00%
ID	54	44	10	32	12	9	1	261	241	1.63	2	42	171	31	96.88%
MT	45	36	9	29	7	5	4	237	202	1.59	2	21	335	20	68.97%
NV	4	3	1	1	1	2	0	259	259	2.00	2	85	85	1	100.00%
OR	51	37	14	30	7	7	7	209	201	1.67	2	18	218	18	60.00%
WA, E	37	24	13	14	16	5	1	351	339	2.00	2	53	219	14	100.00%
WA, W	0	0	0	0	0	0	0								
GUAM	0	0	0	0	0	0	0								
NMI	0	0	0	0	0	0	0								

National Survey of Chapter 12 Cases Filed April 20, 2005 Through July 31, 2011

Circuit and District	# of Cases	# Of Individual Cases	# Of Entity Cases	# Confirmed	# Dismissed	# Pending	Other Disposition	Ave. Days to Conf.	Median Days to Conf.	Average Tax Years to Conf.	Median Tax Yrs to Conf.	Low Doc. # Conf.	High Doc. # Conf.	# Conf. Order Docket >= 50	# Doc. # Conf. Order >= 50	% Doc. # Conf. Order >= 50
10th	**230**	**199**	**31**	**130**	**54**	**38**	**6**	**331**	**231**	**1.90**	**2**	**24**	**580**	**92**	**70.77%**
CO	30	25	5	11	12	4	3	351	216	1.73	2	44	117	9	81.82%
KS	106	97	9	68	16	21	1	417	407	2.07	2	24	580	53	77.94%
NM	10	7	3	6	4	0	0	224	177	1.67	2	33	174	2	33.33%
OK, N	4	4	0	0	2	2	0								
OK, E	15	12	3	8	3	2	0	237	214	1.88	2	30	190	7	87.50%
OK, W	47	43	4	33	6	6	2	206	191	1.67	2	26	98	18	54.55%
UT	14	8	6	4	8	2	0	200	197	1.75	2	48	98	3	75.00%
WY	4	3	1	0	3	1	0								
11th	**340**	**267**	**73**	**185**	**87**	**59**	**9**	**264**	**254**	**1.77**	**2**	**23**	**271**	**147**	**79.46%**
AL, N	25	25	0	15	4	6	0	265	256	1.93	2	36	223	13	86.67%
AL, M	20	18	2	12	3	4	1	292	314	1.75	2	26	161	7	58.33%
AL, S	6	6	0	5	0	1	0	201	206	1.20	1	70	92	5	100.00%
FL, N	13	10	3	2	9	2	0	359	359	2.00	2	54	79	2	100.00%
FL, M	86	61	25	40	29	15	2	282	269	1.83	2	26	222	30	75.00%
FL, S	21	8	13	8	9	3	1	297	270	1.75	2	23	217	6	75.00%
GA, N	22	20	2	9	6	6	1	277	220	1.89	2	34	102	5	55.56%
GA, M	102	86	16	67	15	17	3	248	236	1.69	2	24	153	56	83.58%
GA, S	45	33	12	27	12	5	1	254	262	1.86	2	34	271	23	85.19%

AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
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No. 10-875

In The
Supreme Court of the United States

LYNWOOD D. HALL and BRENDA A. HALL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* PROFESSORS NEIL E. HARL, JACK F. WILLIAMS AND ROBERT HIMSCHOOT IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are three professors who have extensive experience in the areas of bankruptcy and tax law.[2] *Amici* are not predisposed to debtors or creditors or federal or State governmental bodies. They file this brief in opposition to the decision of the Ninth Circuit Court of Appeals below, *U.S. v. Hall*, because overturning the decision below offers an opportunity to establish a workable solution to an extremely difficult problem that has faced family farmers since the institution of Chapter 12 – how to deal with the claims of governmental units occasioned by the disposition of farm assets used by the family farmer in their farming operation.

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[1] Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the *Amici* file this brief with the written consent of all parties, which are appended hereto. No counsel for a party authored this brief in whole or in part. No person or entity including *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

[2] Neil E. Harl is the Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor of Economics, Iowa State University; member of the Iowa Bar. Jack F. Williams is a Professor of Law at Georgia State University College of Law. Robert Himschoot is a retired Professor of Business Law at the University of Northern Iowa.

SUMMARY OF THE ARGUMENT

"If the only tool you have is a hammer, you tend to see every problem as a nail."[3] The Internal Revenue Service (the "IRS" or the "Government") has a hammer – it is the Internal Revenue Code found in title 26 of the United States Code (the "IRC"). Therefore, the IRS and, most unfortunately, the Circuit Courts in *U.S. v. Hall*,[4] and *In re Dawes*,[5] have seen the interpretation of §1222(a)(2)(A) as a federal tax question that should be addressed through the IRC lens. In bankruptcy, that approach is generally incorrect. For example, §1222(a)(2)(A) of the Bankruptcy Code is a priority provision relating to all claims asserted by **any** governmental unit (federal, state, and local), not merely an income tax provision,[6] and certainly not a federal income tax provision. That section must be read in a manner consistent with the overall intent, purposes, and policies of the Bankruptcy Code, not necessarily with the provisions or policies of the IRC. To be sure, sound statutory construction of Bankruptcy Code provisions should consider the IRC when federal taxes are at issue; however, consideration of the IRC in addressing a Bankruptcy Code section is a far cry

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[3] *Abraham Maslow* (1908-70), American psychologist, founder humanistic psychology.

[4] *U.S. v. Hall*, 617 F.3d 1161 (9th Cir. 2010),

[5] *In re Dawes*, ___ F.3d ___, 2011 WL 2450930 (10th Cir. 2011).

[6] Chapter 12 does contain within it a section that specifically references "special taxes." See 11 U.S.C. §1231.

from abdicating the responsibility of construing the Bankruptcy Code provision within the context of bankruptcy law and policy in a forum of multiple stakeholders – the Bankruptcy Court. This is especially the case, as here, where the provision at issue does not mention federal income taxes, nor, for that matter, taxes at all.

Amici support the debtor's argument based upon the historic interpretation of bankruptcy law and tax law. *Amici* emphasize the significance of interpreting bankruptcy law through the Bankruptcy Code and not forcing a purely tax code based interpretation onto a bankruptcy law provision of the Bankruptcy Abuse Prevention Consumer Protection Act of 2005 (hereinafter BAPCPA). The bankruptcy provision that is being interpreted by this Court clearly affects tax claims of governmental entities but, in addition, it also affects other priority claims of governmental units encountered by reorganizing family farmers. Examples of these claims include breaches of assumed pre-petition contracts under the Conservation Reserve Program (CRP) and the Direct and Counter-Cyclical Program (DCP) administered by the Farm Service Administration (FSA).[7] These claims can also include the claims for breach of post-petition CRP and DCP contracts entered into between the family farmer and the FSA. The breach of either an assumed

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[7] The Farms Service Agency (FSA) is the federal governmental unit that administers contracts between the United States Department of Agriculture (USDA) and farmers known as "producers."

contract with FSA or a post-petition contract with FSA creates an administrative priority claim under the Bankruptcy Code. Since these are not tax claims it does not make sense to interpret §1222(a)(2)(A) exclusively through the eyes of the tax code. Instead, it is appropriate to review the statute through the perspective of the Bankruptcy Code.

Amici also point out that the problems with claims of governmental units faced by family farmers seeking to right-size their farms to make them economically viable have existed since Chapter 12 was added to the Bankruptcy Code in 1986. Other creditors, in addition to governmental units, have utilized the administrative claims generated by the transfer of farm assets as a weapon to keep family farmers from confirming their Chapter 12 Plans of reorganization.

The problems faced by family farmers are real. *Amici* review several real life examples of these problems to acquaint the Court with the realities being faced by family farmers in Chapter 12 cases.

The legislative history of §1222(a)(2)(A), while not extensive, is clear that the section was intended to apply to the governmental claims arising from post-petition transfers of farm assets used in the family farmer's operation – in short, it was intended to provide a fresh start for the family farmer, not leave the family farmer with taxes and other governmental claims to pay after confirmation of the plan and discharge at the end of the case. The code section being interpreted by this Court has been part of bankruptcy legislation unchanged in form since 1999. Therefore,

the statements of its sponsor at the various times the legislation was introduced should be given credence in interpreting it.

Amici have commissioned a survey of all 2682 Chapter 12 cases filed in the United States since the enactment of BAPCPA on April 20, 2005. This survey has revealed that the vast majority of Chapter 12 cases span two tax years. This survey is at odds with the assertions of the Ninth and Tenth Circuit Courts of Appeals decisions regarding the similarity of Chapter 12 to Chapter 13 bankruptcy. Requiring that a separate taxable entity be established in order to allow family farmers to utilize the provisions of §1222(a)(2)(A) simply does not work – doing so means that the post-petition income from the sales of farm assets used in the farming operation as well as other post-petition income cannot be utilized to pay the claims of governmental units. If the post-petition claims of governmental units arising from the sale of farm assets used in the debtor's farming operation remain the responsibility of the family farmer to be paid after discharge, the family farmer is effectively denied the fresh start envisioned by Congress when it enacted Chapter 12 and when it modified the treatment of governmental claims in §1222(a)(2)(A) enacted as a part of BAPCPA, thereby creating "new Chapter 12."[8]

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[8] The term "new Chapter 12" refers to Chapter 12 after enactment of BAPCPA.

ARGUMENT

Statement 1: Family farmers have struggled with priority claims of governmental units since Chapter 12 was enacted.

Chapter 12 was enacted and took effect on November 26, 1986 as Congress's answer to the farm crisis of the 1980s. From the outset family farmers have had problems with the tax claims of governmental units that arose as a result of pre- and post-petition transfers of farm assets that were necessary in order to right-size their operations. An example of this problem is set forth in *John G. Specht, Carol C. Specht, Debtors (hereinafter In re Specht)*, 96-21022-D (Bankr. N.D. IA April 9, 1997) in which the family farmers' Chapter 12 Plan was denied confirmation, at least in part, because of significant capital gains taxes triggered by a proposed deed-back of collateral to a secured creditor. (App. 1-9). In *Specht*, the secured creditor utilized the inability of the debtors to pay the tax claims arising from the proposed disposition of part of their farm as a basis to defeat confirmation as well as a basis to dismiss the case. In *Specht*, the taxes in question were the capital gains taxes arising from the deed back of 80 acres that would lead to the assessment of income taxes on $153,000 of gain had the Chapter 12 Plan been confirmed and the deed-back completed. (App. 6).

The claims of governmental units in several typical Chapter 12 cases are set forth in tabular form in App. 10. These cases highlight taxes that were incurred both pre-petition and post-petition by several

family farmers who liquidated some of their farm assets. The staggering numbers are representative of the tax claims encountered by many family farmers seeking to right-size their operations through Chapter 12 bankruptcy. A brief review of the fact patterns of some family farmers provides a backdrop for this Court's review of §1222(a)(2)(A).

The Knudsens

Anders and Cynthia Knudsen were in their mid 40s when they filed their Chapter 12 case on July 1, 2005. They had lived on their Mitchell County Iowa farm since 1983 and had been in the swine business since they began farming. From 1994 to 2003, Anders Knudsen served on the Iowa Soybean Promotion Board, which is a non-profit product promotion board. During the 1990's they greatly enlarged their swine herd and the buildings to house their swine enterprise. When they completed the expansion of their swine herd in 2003 they had 300 sows and could farrow to finish 5,500 hogs per year. (Bankruptcy 05-03136 N.D. IA Docket 136, 1).

The Knudsens had severe disease problems beginning in 1998. The sows had APP, a swine disease, causing the pigs to die. The Knudsens purchased new gilts and bred them off-site and brought them into the operation in the fall of 1999. Unfortunately, the new sow herd contracted PRRS, another swine disease, resulting in fewer pigs being weaned per sow per year than normal, which increased the Knudsens' losses. (Bankruptcy 05-03136 N.D. IA Docket 136, 2).

The Knudsens' unfortunate luck was not limited to the diseases the pigs contracted. On February 16, 2001, Anders Knudsen was involved in a snowmobile accident. In September of 2001, Anders Knudsen fell off the roof of his home, falling two stories and breaking both ankles. The fall kept him off his feet until April of 2002. The financial problems were exacerbated by these accidents as the Knudsens were forced to hire help to maintain their operations. In the summer of 2003 the Knudsens' bank was pressing them to cease operations. (Bankruptcy 05-03136 N.D. IA Docket 136, 2). Anders and Cindy Knudsen significantly changed their farming operation in 2004 by selling their swine herd and the equipment utilized in farrowing pigs. They also remodeled their farrowing house and nursery to accommodate Special Early Weaning pigs that they would raise for an integrator.[9] (Bankruptcy 05-03136 N.D. IA Docket 136, 2). The sales of their swine herd and farrowing equipment led to significant income taxes. (Bankruptcy 05-03136 N.D. IA Docket 136, 7; App. 10). In their Chapter 12 Plan they proposed the sale of 120 acres of non-homestead property to further reduce their indebtedness and increase the likelihood of the success of their Chapter 12 reorganization. The post-petition sale proposed by the Knudsens was expected to result in

---

[9] An "integrator" is a third party that owns the pigs being finished by a farmer in the farmer's facilities. The Knudsens changed their hog operation from a farrow-to-finish operation to a pig "bed and breakfast" where they cared for the pigs owned by their integrator.

sizeable income tax claims as well. (Bankruptcy 05-03136 N.D. IA Docket 136, 11; App. 10).

Since filing their bankruptcy through the date their plan was confirmed, a period of just over three years, the Knudsens supplemented their farm income with off-farm jobs. When the plan was filed, Anders Knudsen worked as a Christian radio show host and Cynthia Knudsen worked part time in a jewelry store. (Bankruptcy 05-03136 N.D. IA Docket 136, 2-3).

The LeGassicks

When their Chapter 12 Plan was filed, Jason and Jodi LeGassick were 30 and 31 years of age respectively. They lived in Manchester, Delaware County, Iowa with their five minor children on a farm that has been in the LeGassick family for three generations. Jason works as a sales manager for a dairy equipment company and Jodi works on the farm and cares for their children. Jason gained considerable dairy farming experience under the tutelage of his grandfather and father and during the time he managed a large dairy farm in Minnesota. Jason and Jodi farmed together since their teens. (Bankruptcy 10-02202 N.D. IA Docket 67, 1).

When the LeGassicks acquired their current land holdings from Jason's parents, many dairy farmers were ceasing operations due to reduced milk prices and increased feed costs. Despite Jason's innovative techniques and the cows' high production, their dairy farming operation was not profitable. (Bankruptcy

10-02202 N.D. IA Docket 67, 1). Their operation was incapable of supporting their significant indebtedness. To resolve their indebtedness to Farm Credit Services of America and resolve the foreclosure filed by Farm Credit they agreed to sell 154 of their 179 acres. This post-petition sale led to significant tax obligations. At confirmation, Jason LeGassick was employed by Bou-Matic, LLC of Madison, Wisconsin. This dairy supply company paid him a base salary of approximately $37,000 per year. His off-farm income was projected to be $70,000 per year with commissions. Id. at 11. The LeGassick's Chapter 12 Plan was confirmed on March 18, 2011. (Bankruptcy 10-02202 N.D. IA Docket 90). In their plan the post-petition tax obligations arising from their sale of the farm and farm equipment used in their farming operation, estimated to be $81,000 were treated as pre-petition unsecured claims in accordance with *Knudsen v. I.R.S.*, 581 F.3d 696 (8th Cir. 2009). (Bankruptcy 10-02202 N.D. IA Docket 67, 6).

The Richters

When their amended Chapter 12 Plan of Reorganization was filed in July of 2010 Jerome (Jerry) and Deborah (Deb) Richter were 64 and 60 years of age respectively. They had farmed for most of their married life. Deb works at Clinton Community College in Clinton, Iowa. The Richters had a serious fire in January of 2002 that cost them their entire feed inventory, their hay and most of their machinery. The fire insurance coverage was over $60,000 short of

covering their losses. Jerry had also worked as a contractor for over 30 years prior to serious on-the-job injuries in 2005 and 2006 which curtailed his contractor earnings for those years. Jerry's health improved significantly and he has been slowly resuming his activities as a contractor. Jerry's contracting will provide the additional income needed to supplement the farm income and Deb's salary so their plan will be feasible. (Bankruptcy 09-06081 S.D. IA Docket 40, 1).

The Richters' purebred Simmental beef operation was growing, but was not making sufficient income to cover prior years' losses. Unfortunately, the setbacks from the fire; the absence of contracting income; significant operating costs occasioned by exceedingly high feed prices in 2008; together with the accumulated debt that resulted from those losses had devastated their business. In 2008, the Richters agreed to sell approximately 75 percent of their cattle to reduce their indebtedness to their Bank. The proceeds of sale fell far short of expectations, and the remaining cattle operation was unable to service the indebtedness owed to the bank. In 2009 the Richters met with their bank at mediation and agreed to sell approximately 120 acres of real estate; survey their homestead so it appeared on a separate legal description; re-financing it utilizing a traditional home mortgage; and to repay the balance of their debt to their bank over 30 years with interest accruing at the rate of 5.25 percent per annum. Only 80 of the approximately 120 acres the Richters agreed to sell had been sold before their Chapter 12 was filed. During their Chapter 12, the

Richters listed the East 40 acres they had previously agreed to sell. (Bankruptcy 09-06081 S.D. IA Docket 40, 6). The pre-petition and post-petition income taxes incurred by the Richters through their sales of their farm assets were significant (App. 10) and they would not have been able to pay them in full without §1222(a)(2)(A) interpreted in accordance with *Knudsen v. I.R.S.*

The Halls

The Halls sold their Arizona ranch after filing their Chapter 12 bankruptcy to stave off a foreclosure. They are currently living on Social Security. The IRS objected to confirmation of the Halls' Chapter 12 Plan citing the $29,000 tax that the Halls had incurred as a result of the sale of their ranch after filing their bankruptcy. *U.S. v. Hall,* 617 F.3d 1161, 1162 (9th Cir. 2010).

The Fickens

Kent and Roberta Ficken are the parents of four children. (Bankruptcy 05-52940 CO Docket 1, 29). When their bankruptcy plan was filed on January 18, 2006, Kent and Roberta Ficken owned a total of 977 acres of farm real estate. Three hundred twenty acres of the real property was security for their bank loans. In addition, debtor Roberta Ficken owned 217 acres of grassland that she received in a divorce property settlement. The debtors lease 2,064 acres, 740 acres is tillable and the remainder is grassland. The debtors

produced cattle and raised alfalfa hay, pinto beans and wheat to sell. (Bankruptcy Case 05-52940 CO Docket 55, 3).

In 2002 through 2004, the debtors reduced their cow/calf herd from 400 head to approximately 88 head. In their Chapter 12 Plan the Fickens agreed to sell their remaining cows and calves and apply the proceeds to the bank loan so that their total debt would be reduced. Under their plan the Fickens would continue to lease the grassland as well as the cattle. Id.

In 2004, the Fickens sold 320 acres of farm ground for approximately $470,000.00 and also applied the net proceeds to their loans with their bank. Also in 2004, the Fickens sold a portion of their farm machinery and equipment and applied the sales proceeds of approximately $77,000.00 to the bank loans. Id.

Prior to filing their Chapter 12 bankruptcy the bank noticed a default on the Fickens' notes and commenced foreclosure on its remaining real property collateral. On July 25, 2005, the Fickens filed for relief under Chapter 12 of the Bankruptcy Code, 05-28341 HRT. On November 28, 2005,[10] the debtors obtained an order of dismissal of that case and re-filed their Chapter 12 to obtain the advantages of the provisions

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[10] The Fickens' Chapter 12 Plan erroneously states that their first Chapter 12 case was dismissed on February 28, 2005. The filing date of their first Chapter 12 was July 25, 2005.

of the Bankruptcy Code that became effective on October 17, 2005. Id.[11] The Fickens' need for §1222(a)(2)(A) priority stripping is shown on the table contained at App. 10.

The fact patterns set forth above are illustrative of the facts of most family farmer cases. The fact pattern of *In re Dawes*, ___ F.3d ___, 2011 WL 2450930 (10th Cir. 2011) is aberrational, as evidenced by the protracted tax protestor litigation over a time period spanning more than two decades, and should not be used as a backdrop to consider the proper interpretation of §1222(a)(2)(A). Chapter 12 was amended by Congress in 2005, effectively creating "new Chapter 12," to assist the family farmer in dealing with the claims of governmental units that arise when they right-size their farming operations. In passing §1222(a)(2)(A), as part of BAPCPA, Congress was addressing a problem faced by family farmers since Chapter 12 was enacted in November of 1986 in the height of the farm crisis.

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[11] Counsel for *amici* notes that the Fickens dismissed their first Chapter 12 case to utilize §1222(a)(2)(A). That dismissal was unnecessary given the April 20, 2005 effective date of §1222(a)(2)(A).

Statement 2: As a bankruptcy provision designed to strip the priority status of certain claims of governmental units, §1222(a)(2)(A) should be construed in accordance with the Bankruptcy Code and bankruptcy policy to promote the effective reorganization of family farm operations.

This is a Chapter 12 case involving an interpretation of a Chapter 12 Bankruptcy Code provision enacted as part of BAPCPA. That provision is §1222(a)(2)(A),[12] which provides:

> The plan shall –
>
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –
>
> (A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operations in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such a manner only if the debtor receives a discharge; [ ]

In order to make their farming operation viable, it was (and still is) often necessary for Chapter 12 debtors to sell farm assets, often triggering significant capital

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[12] 11 U.S.C. §1222(a)(2)(A), which was effective upon enactment of BAPCPA.

gains and income taxes. Before Congress addressed this problem with §1222(a)(2)(A) of BAPCPA, these taxes were treated as priority claims, thereby mandating their full payment as part of a confirmable Chapter 12 Plan.[13] This was the case under "old Chapter 12."[14] Even though administrative and other priority claims (including these tax claims) could be paid in full in deferred payments under prior law, in many instances the debtor still could not meet this requirement, thus giving governmental units such as the IRS a virtual veto of the debtor's Chapter 12 Plan. Section 1222(a)(2)(A) was enacted in 2005 to revoke this veto power. Since the enactment of BAPCPA "new Chapter 12" providing a fresh start for family farmers unfettered by the veto power of governmental units.

Three Circuit Courts of appeal have interpreted §1222(a)(2)(A) since its enactment. The first interpretation was *Knudsen v. I.R.S.*, 581 F.3d 696 (8th Cir. 2009) which held that the post-petition tax on gains arising from sales of farm assets would be "incurred by the estate" and therefore be subject to priority stripping under 11 U.S.C. §1222(a)(2)(A). 581 F.3d at

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[13] See, for example, *In re Specht*, No. 96-21022-D (Bankr. N.D. IA April 9, 1997) (Chapter 12 plan denied confirmation, at least in part, because of significant capital gains taxes triggered by proposed deed-back of collateral to secured creditor). (App. 6-7).

[14] The term "old Chapter 12" is used in reference to Chapter 12 before the enactment of BAPCPA.

710. The second interpretation was rendered in *U.S. v. Hall*, 617 F.3d 1161, 1164 (9th Cir. 2010), which held that the gain on the post-petition sale of farm assets was not "incurred by the estate" meaning that the taxes would remain the responsibility of the debtors, not the bankruptcy estate and would be collectible from the debtors after entry of the order of discharge in their Chapter 12 case. Therefore, the priority stripping features of §1222(a)(2)(A) would not be available to the debtors. The Tenth Circuit Court of Appeals recently followed the Ninth Circuit in *In re Dawes*, ___ F.3d ___, 2011 WL 2450930 (10th Cir. 2011).

Since the enactment of §1222(a)(2)(A) debtors have consistently argued that it should be interpreted in the context of the remedial nature of Chapter 12 of the Bankruptcy Code. Thus, a proper interpretation of that section must include a consideration of that section's language as understood in the Bankruptcy Code, in terms of the intent and remedial purposes as evidenced by Congressional Committee Reports and the overall process leading to its enactment, as well as the overall policies embodied in the Bankruptcy Code in general and Chapter 12 in particular. The Eighth Circuit has adopted the position taken by the debtors. *Knudsen*, 581 F.3d at 710. In contrast, the IRS has consistently argued that §1222(a)(2)(A) should be interpreted by reference to substantially similar language used in the federal Internal Revenue Code, specifically IRC §1231. The Ninth and Tenth Circuits have agreed with the IRS, limiting the

meaning of §1222(a)(2)(A) by importing IRC §1231 and the case law thereunder. *Hall,* 617 F.3d at 1163-64, and *Dawes,* ___ F.3d ___, 2011 WL 2450930 at 2 (10th Cir. 2011).

It is the position of the *amici* that the Ninth and Tenth Circuit Courts have presented too narrow a view in interpreting the relevant provision in this case, and *amici* are concerned that this limited view might lead this Court to interpret the provision erroneously. Contrary to the framing of the issue by those Courts and on appeal in this case, this Court is not asked to interpret a federal income tax provision found in the Bankruptcy Code and certainly is not asked to interpret any provision in the Internal Revenue Code. Rather, this Court must resolve a split in the Circuits in interpreting a Bankruptcy Code governmental claims provision that purports to eliminate the priority and nondischargeable status of *any claim* by *any governmental unit* that arises as a result of sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation. To artificially impose a federal income tax meaning on a Bankruptcy Code section that deals with not only *all governmental tax claims* (federal, state, and local), but also *all non-tax governmental claims* that arise as a result of sale, transfer, exchange, or other disposition is improper.

A. Section 1222(a)(2)(A) is a governmental priority claims provision found in Chapter 12 of the Bankruptcy Code whose application is not limited to federal income tax claims; thus, artificially imposing a reading of that Section driven by Internal Revenue Code definitions and policies is hostile to other relevant Bankruptcy Code provisions and bankruptcy policies.

By relying on the *federal* IRC, the Ninth and Tenth Circuits have failed to appreciate that §1222(a)(2)(A) does not apply exclusively to federal income tax claims. In fact, §1222(a)(2)(A) applies to any tax claim (not just federal income tax claims) of ***any governmental unit*** that arises as a result of sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operations. Thus, tax claims of a state or local taxing authority – such as state and local income taxes, property taxes, sales and use taxes, and other excise taxes – may be eligible for treatment under §1222(a)(2)(A). Moreover, §1222(a)(2)(A) is not limited to tax claims at all; rather, it applies to ***any claim*** of any governmental unit that arises as a result of sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operations. Thus, for example, a post-petition transfer of farm land used in the family farmer's farming operations by a Chapter 12 debtor may generate a governmental claim owed to the FSA in the following situations unless the subsequent

owner agrees to the terms of the contract between the family farmer and the FSA:[15]

a) post-petition entry by the family farmer into a CRP contract;

b) post-petition assumption of a CRP contract by the family farmer;

c) post-petition entry into a FSA contract under the DCP; or,

d) post-petition assumption of a DCP contract by the family farmer.[16]

Farmer participation in these programs is extensive throughout the United States. In the 2010 signup for the Conservation Reserve Program, farmers from 39 states offered to participate in the program offering 4,343,452 acres to be placed in the reserve.[17] The Farm Service Agency accepted 91.6 percent of the offers of land made by farmers. See App. 11 for a reproduction of the CRP Signup 39 State-by-State Breakdown found on USDA's website. As of April of

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[15] The refusal of the subsequent owner to assume the terms of the contract between the family farmer and the FSA constitutes a breach of contract that leads to liquidated damage claims specified in the contracts.

[16] Each of these governmental claims arising post-petition through a breach will constitute an administrative claim under §503(b)(1)(A) and §507(a)(2).

[17] The Conservation Reserve Program is a program administered by the Farm Service Agency. A discussion of CRP is found in *U.S. Through Agr. Stabilization and Conservation Service v. Gerth*, 991 F.2d 1428 (8th Cir. 1993).

2010 the national enrollment stood at 31.2 million acres.[18]

For crop years 2008 through 2012, the DCP provides subsidy payments for the following commodities:[19]

- Wheat;
- Corn;
- Grain sorghum, including dual purpose varieties that can be harvested as grain;
- Barley;
- Oats;
- Upland cotton;
- Long grain rice and medium grain rice (which includes short grain rice), excluding wild rice;
- Soybeans;
- Canola, crambe, flaxseed, mustard seed, rapeseed, safflower; sesame seed and sunflower seed . . . ;
- Peanuts; and

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[18] RS21613 – Conservation Reserve Program: Status and Current Issues, 15-Sep-2010; Tadlock Cowan published by the Congressional Research Service.

[19] http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20081219_insup_en_dcp.html

> Dry peas, lentils, small chickpeas (Garbanzo bean, Desi), and large chickpeas (Garbanzo bean, Kabuli).

These commodities are grown by family farmers throughout the United States. In counsel's experience virtually all family farmers that he represents are involved in CRP and/or DCP contracts when they file Chapter 12 bankruptcy petitions. The assumption of these contracts could lead to administrative expense priority claims if later breached. It is also likely that pre-petition contracts with the FSA will be assumed and new contracts entered by the family farmer after entry into a Chapter 12 bankruptcy. See *In re Allen*, 135 B.R. 856 (Bankr. N.D. IA 1992). Breaches of the assumed contracts as well as the post-petition contracts between the family farmer and the FSA will result in priority administrative expense claims under §507(a)(2) that clearly are covered by priority-stripping features of §1222(a)(2)(A). These examples are not merely an imaginative professor's hypothetical query.

Consequently, the use of a federal income tax provision to constrain the meaning of a Chapter 12 Bankruptcy Code provision fails to appreciate that §1222(a)(2)(A) is a bankruptcy priority provision that regulates the priority and dischargeability of certain claims of any governmental unit and is not simply a federal income tax provision embedded in the Bankruptcy Code.

B. Section 1222(a)(2)(A) is an integral part of Chapter 12 of the Bankruptcy Code and should be interpreted within the context of the Bankruptcy Code, bankruptcy law, and bankruptcy policy.

Chapter 12 is a Bankruptcy Code provision found in title 11 of the United States Code. The Bankruptcy Code generally and Chapter 12 particularly have certain well-understood purposes and policies that are frustrated in circumstances where courts resort to the IRC and federal tax law with its own set of conflicting policies and interests for interpretative guidance. Reading §1222(a)(2)(A) instead to apply to the post-petition sales of farm assets of the Chapter 12 debtor would be consistent with the Bankruptcy Code, bankruptcy law, and bankruptcy policies.

Moreover, such an approach to reading §1222(a)(2)(A) is also consistent with the Supreme Court's opinion in *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 549 (1990). In that case, this Court addressed a conflict between the Bankruptcy Code and well-established federal tax law. In *Energy Resources*, the Bankruptcy Court confirmed a Chapter 11 Plan of reorganization that purported to allocate plan payments to retire a federal tax trust fund liability before paying any other federal tax claims. In confirming the plan, the Bankruptcy Court found the plan payment allocation provisions were necessary for an effective reorganization. In reaching the conclusion that a Bankruptcy Court could confirm such a plan, this Court rejected well-established federal tax collection

law on the allocation of involuntary payments by a taxpayer. Under federal tax law, where a payment of a tax by a taxpayer is involuntary (for example, made under compulsion pursuant to a court order), then the IRS and not the taxpayer may direct the application of that payment toward a particular tax obligation. However, where the taxpayer voluntarily pays the tax, then the taxpayer and not the IRS may direct payment. *Energy Resources,* 495 U.S. at 548-49.

In *Energy Resources*, the debtor corporation proposed a plan that would allocate payments to pay the trust fund portion of the tax claim first. That directed payment would reduce not only the claim against the bankruptcy estate, but also would reduce the trust fund liability of the non-debtor insiders of the debtor corporation. The IRS argued that the allocation provision in the plan was inconsistent with applicable federal tax law that permitted the IRS to re-direct an involuntary payment; thus, with the allocation provision, the IRS argued, the plan should not be confirmed. This Court held that federal tax law was largely irrelevant. Rather, the inquiry should be on whether the allocation provision was necessary to an effective reorganization. 495 U.S. at 551. The lower court had made such a finding in confirming the plan; thus, the plan could be confirmed even though it was inconsistent with federal tax law. Furthermore, the Court noted that nothing in the Bankruptcy Code guaranteed that the IRS would get paid in full if the plan failed. According to this Court's holding, if Congress wanted such a guarantee, it would have made

such a provision in the Bankruptcy Code. Thus, in resolving a conflict between a provision and policy within the Bankruptcy Code and a longstanding body of federal tax law on involuntary payments, the Bankruptcy Code prevailed where that conclusion furthered the reorganizational efforts of the debtor. The same can be said for interpretation of §1222(a)(2)(A). The Bankruptcy Code should be the basis for interpretation of §1222(a)(2)(A) so that the post-petition claims of governmental units arising from the sale of farm assets are stripped of priority in furtherance of a family farmer's reorganizational efforts.

The Bankruptcy Code in general and Chapter 12 in particular have certain well-understood purposes and policies that are eclipsed when resorting to the application of IRC provisions such as IRC §1399. Initially, one should note that Chapter 12 is a remedial and substantive chapter for relief under the Bankruptcy Code. As such, to properly understand its role, one must recognize that a chapter for bankruptcy relief, like Chapter 12, is procedurally akin to a collective federal interpleader action. The debtor commences a case for relief under Chapter 12 and then provides notice to all his creditors (stakeholders) of the filing. Upon the filing of the petition, the debtor's property is automatically transferred to the bankruptcy estate where it is protected by the automatic stay (like the *res* in a receivership case that is protected by the doctrine of *in custodio legis*) and used and administered in accordance with the Bankruptcy Code. See *Tenn. Student Assistance Corp. v.*

Hood, 541 U.S. 440, 447-48, (2004); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). As with any collective remedy, such as an interpleader action or receivership, the forum is inhabited by multiple parties making competing claims to assets. Similar to its federal receivership counterpart, the bankruptcy forum cannot and does not limit its focus to a bilateral dispute; rather, the Bankruptcy Court must entertain simultaneous assertions of claims against the property of the estate in accordance with carefully crafted distributional schemes under the Bankruptcy Code.

Consistent with the Bankruptcy Code in general, Chapter 12 bankruptcy policies include the preservation of the family farm and farm operations; the equal distribution of estate property in accordance with the bankruptcy distributional scheme; an inclusive definition of "claim" to ensure the participation in a bankruptcy case of a greater universe of those with an interest in the debtor or the debtor's assets; the fresh start embodied in the Chapter 12 discharge; and family farmer debtor responsibility by delaying the Chapter 12 discharge until full performance under the Chapter 12 Plan.

The Bankruptcy Code strikes a delicate balance between debtors and all creditors – including governments. Thus, one must be cautious in rushing to the IRC, a body of law that seeks bilateral determinations between the government and a taxpayer, in order to understand provisions in the Bankruptcy Code, a body of law that seeks to resolve multilateral

claims and rights in a context far different with far different policies than one would find under the IRC.

The present case illustrates that concern. A fundamental tenet of bankruptcy law is that claims of equal dignity are to be treated equally. The definition of "claim" is found in §101(5) and includes any "right to payment. . . ." Although the definition is a federal question, Bankruptcy Courts regularly consult applicable non-bankruptcy law in an effort to understand better the existence and amount of a particular type of claim. In this case, federal tax law provides that the IRS has a right to payment, that is, a claim, in this Chapter 12 case because the tax was incurred as a result of the sale of an estate asset, the Halls' ranch. The priority of payment rights is exclusively a matter of bankruptcy law, however.

Priority is a bankruptcy term of art; its meaning cannot be gleaned from any other source of law. Under "old Chapter 12" if the sale of the Halls' real estate had occurred in the tax year prior to filing their Chapter 12 petition or during the bankruptcy case, the federal income tax claim that arose from the sale of the land would have been a priority tax claim under §507(a)(8) or §507(a)(2) respectively and would have been entitled to special priority treatment under the Bankruptcy Code prior to 2005.[20] That priority tax claim would have to have been paid in full over time with interest or the Chapter 12 Plan would not have

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[20] See *In re Specht*, App. 7.

been confirmed. This was the case even though the general unsecured creditors were paid little and certainly less than the full value of their claims. In fact, that is the very nature of the priority claim; the priority claim is ensured full payment before any general unsecured creditors are paid at all. Essentially, for every dollar increase in a priority claim, we witness a corresponding dollar decrease in funds left for the general unsecured creditors. Thus, the priority tax claim diverts payment distributions from other general unsecured creditors, disturbing the fundamental policy of equal treatment, and because it must be paid in full (although over time), it renders many Chapter 12 Plans no longer feasible, frustrating the Congressional goals of family farm preservation and family farmer discharge.

The Halls' post-petition sale of real estate, like the Spechts' plan proposing the deeding of real estate to a creditor in partial satisfaction of an allowed secured claim would trigger taxable gain. It would also trigger an administrative expense claim, i.e., a claim with even higher priority than a pre-petition tax claim. Under "old Chapter 12" both types of priority tax claims had to be paid in full to confirm a plan, unless the government agreed to lesser treatment. That was precisely the nature of "old Chapter 12" as constructed by Congress prior to the 2005 changes to the Bankruptcy Code. The problem faced by the debtors in *Specht* was the problem that Congress addressed in 2005 in enacting §1222(a)(2)(A). By enacting the changes to Chapter 12 in BAPCPA Congress

provided an escape from the veto power of governmental units in confirmation of plans. This relief for family farmers was intended for claims owed to any governmental unit arising from the sale of farm assets used in their farming operations.

The legislative history of §1222(a)(2)(A) is sparse but illuminating.[21] One of the principal sponsors of the law was Senator Charles Grassley, the only United States Senator who is also a family farmer. In support of the bill, Senator Grassley observed:

> But Chapter 12 can be made even better. "Safety 2000" will make Chapter 12 better. The bill expands the definition of family farmer so that more farmers can use Chapter 12. Under current law, family farmers can't use Chapter 12 to save their farms if a farmer has more than $1.5 million in debt. This is too restrictive, and my bill would let farmers who have up to $3 million in debt use Chapter 12. "Safety 2000" also helps farmers to reorganize by keeping the tax collectors at bay. Under current law, farmers often face a crushing tax liability if they need to sell livestock or land in order to reorganize their business affairs. According to Joe Peiffer a bankruptcy lawyer from Hiawatha, Iowa, who represents many family farmers,

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[21] The text of §1222(a)(2)(A) has remained unchanged through four introductions by its prime backer Senator Charles Grassley. See App. p. 13 for a side by side comparison of the text of §1222(a)(2)(A) as it was introduced each time.

> high taxes have caused farmers to lose their farms. Under the Bankruptcy Code, the I.R.S. must be paid in full for any tax liabilities generated during a bankruptcy reorganization. If the farmer can't pay the I.R.S. in full, then he can't keep his farm. This isn't sound policy. Why should the I.R.S. be allowed to veto a farmer's reorganization plan? "Safety 2000" takes this power away from the I.R.S. by reducing the priority of taxes during proceedings. This will free up capital for investment in the farm, and help farmers stay in the business of farming.[22]

Recognizing the problems with Chapter 12 farm asset sales under prior bankruptcy law, "old Chapter 12," through the 2005 amendments Congress rolled back the priority treatment of certain specific claims of governments that arise in Chapter 12 cases. Section 1222(a)(2)(A) does not reduce a governmental unit's claim. Section 101(5) still controls that determination and directs us to consider applicable nonbankruptcy law like the IRC in determining the computation of the claim. Rather, §1222(a)(2)(A) strips priority treatment of certain claims of a governmental unit. Because §1222(a)(2)(A) is a priority altering provision, and priority is an exclusive bankruptcy concept granted by the Bankruptcy Code and no other source of law, it is mandatory that only the Bankruptcy Code and its policies be considered in interpreting that Section.

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[22] 145 Cong. Rec. S750-02.

Statement 3: Governmental claims arising from post-petition transfers triggering §1222(a)(2)(A) treatment are payable with bankruptcy estate assets.

When a debtor files for relief under Chapter 12, a bankruptcy estate is created. The estate is a collection of property used to pay claims of all kinds, unsecured, priority and administrative expense of administering the assets (including liquidating them through sales). Administrative expense claims under §§503 and 507(a)(2) are paid out of property of the estate, which includes post-petition income under §1207(a)(2). If a trustee is in charge of the bankruptcy estate, the trustee is not personally liable to pay administrative expenses if there are insufficient assets to cover them. The same is true of a debtor-in-possession. Whether a debtor has personal liability outside the bankruptcy to pay administrative expense claims or any other claims is a question of claim dischargeability, which is a separate determination. Affirming the Ninth Circuit's decision in *Hall* would have the effect of keeping the debtor-in-possession from using estate assets, including post-petition earnings, for payment of ordinary operating expenses of the business, including income taxes not de-prioritized under §1222(a)(2)(A), which are administrative expenses of the bankruptcy estate.

Statement 4: Myth vs. reality. Three myths about Chapter 12 are revealed.

A. Myth One – The time a Chapter 12 case is pending before confirmation is short.

The Tenth Circuit in part based its holding that allocating taxes in Chapter 12 to the debtor and not the estate on its statement that:

> [d]isregarding the temporary existence of a bankruptcy estate for purposes of tax liability tidies the accounting somewhat, because there's only a single return – the debtor's – that needs to be filed and kept track of. And, because Chapter 12 and 13 cases are typically confirmed quickly (at least compared to bankruptcies under Chapters 7 and 11), the expectation is that the debtor's post-petition earnings and taxes will meet up in his hands soon enough. *In re Dawes*, ___ F.3d ___, 2011 WL 2450930 (10th Cir. 2011), at 3.

The Tenth Circuit cites COLLIER ON BANKRUPTCY in support of the myth that the plan will be swiftly confirmed. The reality is that the time from filing to confirmation in Chapter 12 cases is not swift. Counsel for the *amici* has conducted a survey of the 2,662 Chapter 12 bankruptcies filed on a district-by-district basis since BAPCPA was enacted on April 20, 2005 through July 31, 2011. (App. 22-27). The survey reveals that of all the districts in the country, the minimum average days from filing to confirmation was 149 days, nearly five months, in the Western

District of North Carolina. (App. 23). The survey also reveals that the maximum average days from filing to confirmation was 1,231 days, in excess of three calendar years, in the Southern District of West Virginia. Id. The statistics from the entire database, including the 1,362 Chapter 12 cases in which plans were confirmed, are set forth in a histogram that highlights that the minimum time from filing to confirmation was 34 days[23] while the maximum time was 1,814 days.[24] The most useful presentation of these statistics is found in the histogram which reveals that the median time to confirmation is 239 days – essentially eight months. (App. 21). The histogram also reveals that the 25th percentile is 178 days, nearly six months. Id. Thus, only 25 percent of cases have reached confirmation in six months. This is not the swift confirmation suggested in *Dawes*.

The Tenth Circuit continued its myth in equating Chapter 12 bankruptcy cases with Chapter 13 bankruptcy cases stating, "The administrative reality [is] that most Chapter 13 estates will only remain open for 1 or 2 months until confirmation of the plan." Unfortunately, the Tenth Circuit was simply wrong in this assertion. The data from counsel's nationwide survey reveal the reality that a family farmer in a Chapter 12 case will be waiting for confirmation significantly longer than 1 or 2 months. (App. 21-27).

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[23] Bankruptcy 11-60012 S.D. IL.

[24] Bankruptcy 06-10692 W.D. PA.

The median time span from filing to confirmation is two tax years. (App. 22-27).

The harsh reality faced by family farmers is that they will be in Chapter 12 for multiple tax years during which time they will be unable to use post-petition earnings to pay post-petition taxes until the plan is confirmed. The chart at App. 14 illustrates that even in a simple Chapter 12 case, where the plan was confirmed in less than five months, the case spanned two tax years before confirmation – the time when the Tenth Circuit believes that the debtor and his income will be reunited.

B. Myth Two – Chapter 12 cases are similar to Chapter 13 cases.

The Tenth Circuit's analysis reveals a "myth" that it believes that a Chapter 12 bankruptcy is more like a Chapter 13 bankruptcy than a Chapter 11 bankruptcy. Nothing could be further from the truth. Counsel's national survey reveals the complexity of the cases by spotlighting the docket number of the Order of Confirmation. Across the United States 65.63 percent of the Chapter 12 cases that are confirmed have a confirmation order with a docket number equal to or exceeding 50. (App. 22). Most Chapter 12 cases are far more complex than Chapter 13 cases that are only open for 1 to 2 months prior to confirmation and generally have fewer docket entries prior to confirmation.

Chapter 12 is more like Chapter 11 than Chapter 13 because all Chapter 12 cases are business cases as are most Chapter 11 cases. A table from the Administrative Office of the United States reveals that 86.53 percent of the Chapter 11 cases filed are business cases, while only 0.98 percent of the Chapter 13 cases were business cases. (App. 15). Chapter 12 bankruptcy cases are much more complex than consumer cases as they contain typical business issues that must be addressed including:

1) Applications to incur secured debt to plant crops;

2) Cash collateral applications;

3) Applications to sell real property outside the ordinary course of business;

4) Applications to sell equipment and/or livestock outside the ordinary course of business;

5) Motions to assume or reject contracts; and,

6) Complex valuation issues of business assets.

In many Chapter 12 cases courts find resolution of business issues is a basis to extend the deadline for the family farmer to file the Chapter 12 Plan. A review of the Chapter 12 case of Brett Shulista and Patricia Shulista pending in the Bankruptcy Court of the Northern District of Iowa and the companion case HighSide Pork, LLC filed on January

8, 2010, illustrate this point. (Bankruptcy cases 10-00019 and 10-00020 N.D. IA Docket 1). When these cases were filed the Shulistas and HighSide had no financing to feed their 5,000+ market hogs; the feed vendors were unwilling to supply feed on credit; and it was unclear whether the market hogs were owned by the Shulistas individually or by HighSide Pork, LLC. Numerous feed suppliers and a veterinarian claimed liens in the hogs. The Shulistas and HighSide Pork filed emergency motions to allow them to sell their market hogs outside the ordinary course of business. (Bankruptcy 10-00019 Docket 3, 1-7 and 10-00020 Docket 2, 1-7). The sales were completed on the day of filing and the proceeds were held in an interest-bearing escrow account until the priority disputes were resolved. (Bankruptcy 10-00019 Docket 13 and 10-00020 Docket 11).

Two adversary proceedings were filed by the Shulistas' bank, to determine the extent and priority of liens against the veterinary clinic and the feed suppliers. (Adversary Proceeding 10-09031 and 10-09032 filed on April 5, 2010 and April 6, 2010 respectively). A ruling on Cross-Motions for Summary Judgment was entered on April 19, 2011 resolving most of the issues presented for summary judgment. (Adversary Proceeding 10-09031 and 10-09032 Docket 39 and 38 respectively). The adversary in the Shulista bankruptcy was finally resolved by settlement on July 14, 2011. (Adversary Proceeding 10-09032 Docket 32). The other adversary was resolved in May of 2011.

While the adversary proceedings involving the Shulistas' bank proceeded, the Shulistas sued the leasing company to which they had pledged their family farm to secure their repayment of a promissory note and two leases. (Adversary Proceeding 10-09037). This adversary proceeding was finally resolved via agreement on April 15, 2011. (Adversary Proceeding 10-09037 Docket 21). The settlement resulted in significant concessions being given by the leasing company that will enhance the likelihood of the Shulistas to obtain confirmation of their Chapter 12 Plan that was filed on August 1, 2011. (Bankruptcy 10-00019 Docket 159). No plan was filed in HighSide Pork, LLC as it was substantively consolidated with the Shulista case on July 22, 2011. (Bankruptcy 10-00020 Docket 159).

From the filing of their case through the date their Chapter 12 Plan was filed, the Bankruptcy Court extended the deadline for the Shulistas to file their Chapter 12 Plan five times. (Bankruptcy 10-00019 N.D. IA Dockets 52, 79, 119, 132 and 138; March 25, 2010, July 1, 2010, January 19, 2011, March 30, 2011 and May 31, 2011 respectively). The Shulistas' Chapter 12 Plan was filed less than one month after the adversary proceedings were resolved and the cases were substantively consolidated. While the Shulistas' case may be more complex than many Chapter 12 cases it illustrates that Chapter 12 cases are more similar to Chapter 11 business cases than Chapter 13 cases.

c. Myth Three – There is a need to tidy up accounting in Chapter 12 by disregarding the bankruptcy estate.

In *Dawes*, the Tenth Circuit sets up a "myth" that there is a need to "tidy up accounting" when it states that "[d]isregarding the temporary existence of a bankruptcy estate for purposes of tax liability tidies the accounting somewhat, because there's only a single return – the debtor's – that needs to be filed and kept track of." *In re Dawes*, ___ F.3d ___, 2011 WL 2450930 (10th Cir. 2011), at 3. The Eighth Circuit Court of Appeals dealt with the issue of accounting in *Knudsen v. I.R.S.*, 581 F.3d 696, 718-19 (8th Cir. 2009) when it found that the "marginal method" was the proper methodology to utilize in determining the amount of the government's claim that was to be stripped of priority pursuant to §1222(a)(2)(A). In reaching its conclusion the Eighth Circuit stated:

> The "marginal method" requires a family farmer in Chapter 12 to calculate a return for all income, then a second "pro forma" tax return removing all qualifying sales income, so that non-qualifying income would be treated at lower marginal tax rates, and the taxes shown on the "pro-forma" return would represent the tax claim entitled to priority status, while the difference between the taxes shown on the return for all income and the taxes shown on the "pro forma" return would represent the unsecured portion of the tax claim.

There is no need to "tidy up accounting" in Chapter 12 cases. The reality is that the Eighth Circuit clearly addressed that "myth" by providing a clear blueprint to allow separation of the government's priority tax claims from those claims that Congress decided to de-prioritize when it enacted §1222(a)(2)(A).

CONCLUSION

The reasons set forth above demonstrate that when Congress enacted §1222(a)(2)(A) it intended to provide family farmers with a "fresh start" including the ability to address governmental claims. This Court should reverse the Ninth Circuit Court of Appeals decision and remand this case to the Bankruptcy Court with instructions to confirm the Hall's Amended Chapter 12 Plan.

Respectfully submitted,

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August 24, 2011

In the United States Bankruptcy Court
for the Northern District of Iowa

JOHN G. SPECHT, CAROL C. SPECHT	Bankruptcy No. 96-21022-D
Debtors.	Chapter 12

ORDER RE DEBTORS' AMENDED CHAPTER 12 PLAN

This matter came before the undersigned on March 13, 1997 for confirmation hearing on Debtors' Amended Chapter 12 Plan. The following appeared at the hearing: Brian W. Peters and Douglas C. Pearce for Debtors John and Carol Specht; Carol Dunbar, Chapter 12 Trustee; Martin McLaughlin for the United States on behalf of Farm Service Agency (FSA); and Joseph Peiffer for New Vienna Savings Bank. Evidence was presented after which the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A), (L).

FINDINGS OF FACT

Debtors filed their Chapter 12 Petition on April 26, 1996. This is Debtors' third proposed plan. They propose to fund their plan with income from farming and from off-farm employment. Debtors propose to deed 80 acres to FSA to satisfy its secured claim.

Debtors will turn over a tractor to New Vienna Savings Bank.

New Vienna Savings Bank, FSA and the Trustee have all objected to confirmation of the Amended Plan. They share the belief that the plan is not feasible. They argue that Debtors' projected income and expenses are not realistic in light of their past income and expenses. They also point out that Debtors' plan does not acknowledge potential liability for capital gains tax from the transfer of the 80 acres to FSA. The parties dispute the value of the 80 acres considering it is not accessible by road.

In addition, these three objectors have raised various other points. Among them, the Bank asserts that Debtor has incorrectly undervalued its secured claim. It claims a security interest in a pickup, certain calves, the 1996 crop, and proceeds from an IBP check. The Bank also claims a security interest in cattle. It argues Debtors cannot assert that this interest is avoidable as a lien on tools of their trade.

Trustee joins in the Bank's objections regarding feasibility. She also objects to payment of the Bank and the FSA directly by the Debtors, asserting that the payments should be paid through her to monitor timeliness for the protection of creditors. Farm Service Agency states the plan also fails to fully accommodate its secured claim. It concurs with the Bank regarding capital gains tax liability. It also asserts that cattle are not tools of the trade which would support lien avoidance.

The Bank filed a separate Motion to Dismiss and requested dismissal in its objection to confirmation. FSA has joined in that motion. Debtors filed a resistance.

The Court, in earlier confirmation hearings, placed values on certain estate property, as follows: farmstead located in Dubuque County, Iowa – $207,000; 1987 Ford F-150 Pickup – $4,225; 1990 Chevrolet Lumina Eurosport – $5,025. Debtors paid $54,000 for their farmstead in 1971.

Debtors' tax returns for 1990 through 1995 all reflect yearly farm losses. Future income projections under Debtors' plan do not incorporate self-employment and income taxes. Debtor John Specht testified that Debtors' living expenses have decreased based on their son moving out of the house. He anticipates monthly household expenses of $1,300 during the plan; average monthly household expenses for the past year were approximately $1,650. Debtors' monthly reports reflect that these expenses have not decreased since Debtors' son moved out in October.

Carol Specht testified that she now works part-time at a job which could become full-time next year. She also works at a supper club part-time and testified that she will increase her time working there. She anticipates monthly income of $400 during the plan; her average monthly income in the past year is approximately $150.

CONCLUSIONS OF LAW

Under 1225(a)(6), one of the requirements for confirmation is that Debtors "be able to make all payments under the plan and to comply with the plan." This "feasibility" standard requires the Court to determine whether the plan offers a reasonable prospect of success and is workable. *In re Monnier Bros.*, 755 F.2d 1336, 1341 (8th Cir. 1985); *In re Foertsch*, 167 B.R. 555, 565 (Bankr. D.N.D. 1994). It "injects pragmatism into the confirmation process by prohibiting confirmation of overly optimistic reorganization plans clearly destined to fail and by not belaboring the inevitable demise of a hopelessly insolvent debtor." *Foertsch*, 127 B.R. at 565 (citation omitted). The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts. *In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985).

Debtors bear the burden of proof in meeting the feasibility requirement of 1225(a)(6). *In re Rape*, 104 B.R. 741, 748 (W.D.N.C. 1989). The Court considers the farm's earning power, capital structure, economic conditions, managerial efficiency and whether the same management will continue operations. *Id.* at 749. Debtors' income and expense projections may be considered in conjunction with their actual past performance to determine feasibility. *In re Euerle Farms, Inc.*, 861 F.2d 1089, 1090 (8th Cir. 1988). "Because past behavior and productivity are excellent predictors of future production, courts have frequently rejected plans which are premised on highly optimistic

projections of increased production." *In re Crowley*, 85 B.R. 76, 79 (W.D. Wis. 1988).

In *In re Hirt*, 97 B.R. 981, 983 (Bankr. E.D. Wis. 1989), the court found that the debtors' cash flow projections for their farming operations were flawed when tested against their actual circumstances. It found cause to dismiss the case as the case was over ten months old and further delays would be unreasonable and prejudicial to creditors. *Id.* at 985. In *In re Braxton*, 124 B.R. 870, 874 (Bankr. N.D. Fla. 1991), the court found that the debtors' plan was not feasible. The court's valuation rulings increased debt service to secured creditors and actual market prices for finished hogs did not match those the debtors predicted in their plan. *Id.* A question of good faith also existed because of debtors' attempt to satisfy secured creditors by surrendering low, swampy, landlocked parcels of land of questionable value. *Id.* at 875.

Based on actual past performance, Debtors' projections are unrealistic. Monthly expenses and income reported in the past eleven months since Debtors filed their petition do not support those projected in Debtors' plan. Debtors' projected cash price for corn of $2.75 per bushel is not supported by historical averages. The plan does not provide for payment of self-employment and income taxes. Also, it does not totally provide for payment of the Bank's secured claim. Debtor's brief acknowledges that the Bank is secured by certain cattle and offspring and that the

Court's valuation of a vehicle increases the Bank's secured claim.

Debtors assert that turning over the 80 acres to FSA will not have an effect on their tax liability. They argue that the return of the property results in discharge of indebtedness income, excludable from income by Internal Revenue Code 108. The Eighth Circuit held, in affirming a Tax Court decision, that such a transaction is not excludable under I.R.C. 108. *Gehl v. Commissioner*, 102 T.C. 784, 790 (1994), *aff'd*, 50 F.3d 12, 1995 WL 115589 (8th Cir.), *cert. denied*, 116 S. Ct. 257 (1995). The Tax Court concluded that when a debtor transfers property to a creditor having a fair market value exceeding its basis but less than the recourse debt, the gain does not constitute income from discharge of indebtedness. *Id.* The Eighth Circuit affirmed, stating that this land transfer is outside the scope of 108 which excludes income from discharge of indebtedness in certain circumstances. *Gehl*, 50 F.3d 12, 1995 WL 115589, at *3 (unpublished decision).

As the record stands, Debtors' proposal to deed FSA 80 acres in satisfaction of its claim will produce income from a sale or exchange of property. This is not the type of income which is excludable under 108 as income from the discharge of indebtedness. Debtors' basis in the property is $54,000; the fair market value is $207,000. The difference of $153,000 is taxable income under *Gehl*. Debtors' failure to acknowledge this income and related taxes in the plan places

an additional unincluded tax burden upon Debtors and further undermines the plan's feasibility.

The Court concludes that Debtors have failed to prove that their Amended Chapter 12 Plan filed February 18, 1997 meets the feasibility requirement of 1225(a)(6). Debtors filed their Chapter 12 Petition more than 11 months ago, utilizing the benefits of the automatic stay and delaying collection by their creditors. Despite this respite, Debtors have not been able to increase their income or decrease their expenses, according to their monthly reports, sufficient to support a workable Chapter 12 Plan. Debtors' projected income and expenses are overly optimistic and not supported by historical or market data. They have not accurately recognized income tax and self-employment tax liabilities. Further, Debtors have failed to correctly value secured claims.

The Bank and FSA requested dismissal of this case in their objections to confirmation. The Bank subsequently filed a formal Motion to Dismiss, joined by FSA. The Court concludes that it is appropriate to consider dismissal at this time. *See In re Pretzer*, 96 B.R. 790, 793 (Bankr. N.D. Ohio 1989) (concluding court has power to dismiss case on its own motion).

Filing for Chapter 12 protection without the ability to reorganize renders the petition subject to dismissal. *Euerle Farms*, 861 F.2d at 1192. The Eighth Circuit affirmed dismissal in *Euerle Farms* where the debtor had proposed a problematic and unconfirmable plan with payments to creditors being conjectural at best.

Id. In *In re Hirt*, 97 B.R. 981, 985 (Bankr. E.D. Wis. 1989), the court found cause to dismiss in a Chapter 11 farm case where the case was over 10 months old and the record amply demonstrated the debtors' inability to effectuate a feasible plan.

Chapter 12 was structured to require debtors to speedily confirm a plan of reorganization. *Pretzer*, 96 B.R. at 793. Debtors may not request additional time for filing further plans or modifications as a way to prolong protection under Chapter 12 when there is no reasonable likelihood of reorganization. *Id.* Cause exists for dismissal where Chapter 12 debtors have had ample opportunity to propose a plan and have failed to do so. *In re Luchenbill*, 112 B.R. 204, 219 (Bankr. E.D. Mich. 1990).

The Court concludes that dismissal of this Chapter 12 case is appropriate. This is the third plan proposed by Debtors in the 11 months since they filed their petition. Monthly reports indicate Debtors have insufficient income to fund a workable plan. The failure to propose a confirmable plan is creating an unreasonable delay. 11 U.S.C. 1208(c)(1). Confirmation has been denied three times. *Id.* at (c)(5). Further delay will result in diminution of the estate in the absence of a reasonable likelihood of rehabilitation. *Id.* at (c)(9).

WHEREFORE, confirmation of Debtors' Amended Chapter 12 Plan is DENIED.

FURTHER, this case is DISMISSED.

SO ORDERED this 9th day of April, 1997.

Paul J. Kilburg

U.S. Bankruptcy Judge

Illustration of Actual Taxes Arising from the Sale of Farm Assets by Family Farmers

Debtors	Bankruptcy Court	Case Number	Doc. No. & Pg.	Federal Taxes	State Taxes
Knudsen (Pre-petition)	N.D. IA	05-03136	136 pg. 7	$43,248.00	$9,711.00
Knudsen (Post-petition)	N.D. IA	05-03136	287 pg. 1	72,020.00	896.00
LeGassick (Post-petition)	N.D. IA	10-02202	67 pg. 6	81,000.00 est	
Ficken (Post-petition)	CO	08-01687	29 pg. 11	38,965.00	
Hall (Post-petition)	AZ	05-04423	171 pg. 2	29,000.00	
Schilke (Post-petition)	NE	06-41813	34 pg.1	33,108.00	
Tolander (Pre-petition)	S.D. IA	07-04458	18 pg. 4	32,629.00	
Richards (Post-petition)	N.D. IA	09-03611	40 pg. 4	40,000.00	10,000.00
Richter (Pre-petition)	S.D. IA	09-06081	40 pg. 5	25,936.00	23,805.00

CRP Acceptable Offers (50,094 Total Offers)
As of: September 10, 2010

State	Offers	Acres	EBI	Rent	Percent Accepted
Alabama	932	47,883	272	40.96	95.10%
Alaska	2	351	247	46.72	100.00%
Arkansas	215	12,255	289	63.69	88.50%
California	45	11,024	260	54.32	97.80%
Colorado	3,642	739,467	269	32.84	96.20%
Delaware	5	130	221	84.71	50.00%
Florida	147	5,915	273	42.90	98.00%
Georgia	389	13,868	318	50.17	100.00%
Idaho	667	95,487	267	49.59	78.30%
Illinois	2,550	55,314	258	131.34	85.50%
Indiana	554	10,001	260	126.54	86.20%
Iowa	4,135	128,243	279	165.31	94.90%
Kansas	7,526	618,905	286	38.92	98.00%
Kentucky	608	20,038	324	112.38	93.10%
Louisiana	97	5,144	299	50.03	96.00%
Maine	48	1,512	238	32.44	50.00%
Maryland	36	529	269	74.17	97.30%
Michigan	401	8,810	254	83.62	93.70%
Minnesota	1,145	44,543	259	71.18	92.20%
Mississippi	1,391	74,211	314	50.63	97.20%
Missouri	2,572	107,078	299	102.77	98.60%
Montana	1,175	224,198	243	27.72	70.70%
Nebraska	1,919	189,515	297	45.87	95.10%
New Mexico	57	11,069	327	37.05	91.90%
New York	63	1,340	264	50.53	95.50%

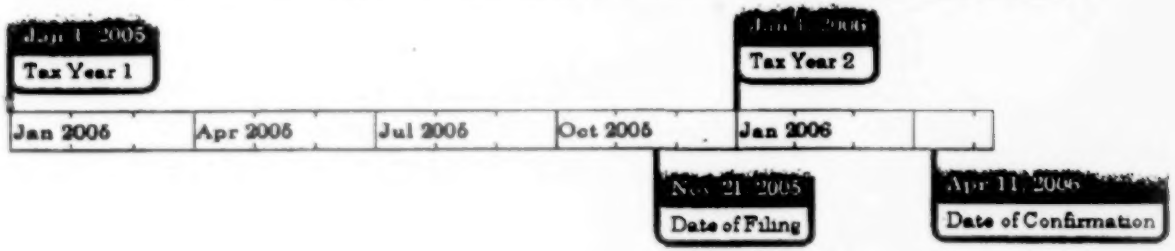
CRP Acceptable Offers (50,094 Total Offers)
As of: September 10, 2010

North Carolina	526	10,290	282	47.80	92.80%
North Dakota	1,398	151,985	247	33.36	80.00%
Ohio	311	5,255	265	96.60	95.10%
Oklahoma	1,885	226,875	304	34.03	91.00%
Oregon	343	75,720	302	58.42	86.80%
Pennsylvania	21	550	301	52.57	95.50%
South Carolina	352	13,010	268	30.48	98.60%
South Dakota	1,324	124,754	247	50.30	86.10%
Tennessee	766	25,541	285	80.52	96.10%
Texas	5,238	858,436	283	36.90	87.20%
Utah	496	116,567	275	31.66	95.80%
Virginia	140	2,791	262	36.15	88.60%
Washington	1,136	182,255	315	49.22	84.30%
Wisconsin	1,261	26,266	277	91.93	93.80%
Wyoming	343	96,328	267	26.24	92.50%
National	45,862	4,343,452	280	46.08	91.60%

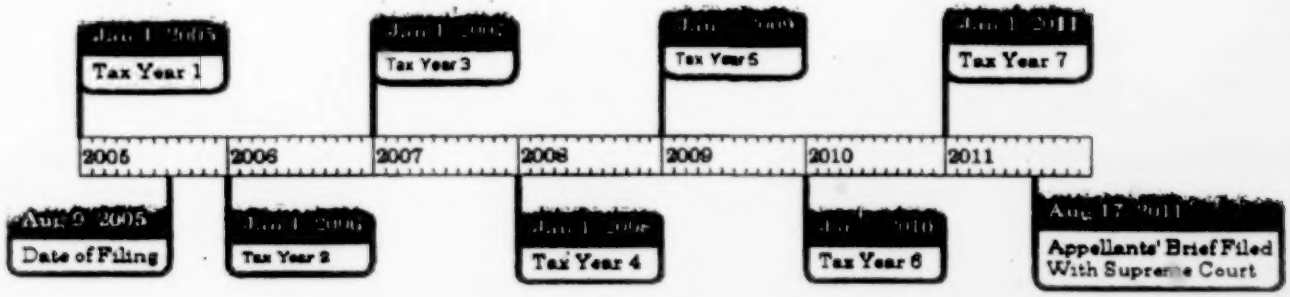
Comparison of §1222(a)(2) Amendment from First Introduction to Passage

Safety 2000 **S. 260 Section 3**	**Bankruptcy Reform Act of 1999 §1004 146 Cong. Rec. S393-01 (S423)**	**Bankruptcy Reform Act of 2000 §1003** **146 Cong. Rec. H9759**	**BAPCPA 2005 Section 1003** **PL 109-8, 2005 S 256**
AMENDMENTS TO CHAPTER 12 OF TITLE 11, U.S. CODE.	**CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.**	**CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.**	**CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.**
(a) CONTENTS OF PLAN- Section 1222(a)(2) of title 11, United States Code, is amended to read as follows: `(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless-- `(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; or `(B) the holder of a particular claim agrees to a different treatment of that claim;	(a) CONTENTS OF PLAN- Section 1222(a)(2) of title 11, United States Code, is amended to read as follows: `(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless-- `(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; or `(B) the holder of a particular claim agrees to a different treatment of that claim;'.	(a) CONTENTS OF PLAN- Section 1222(a)(2) of title 11, United States Code, is amended to read as follows: `(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless-- `(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; or `(B) the holder of a particular claim agrees to a different treatment of that claim;'.	(a) CONTENTS OF PLAN- Section 1222(a)(2) of title 11, United States Code, [] is amended to read as follows: `(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless-- `(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; or `(B) the holder of a particular claim agrees to a different treatment of that claim;'.

Tax Year Timeline – Jerry Calico Bk. 05-90080 W.D. AR



Tax Year Timeline – Lynwood Hall Bk. Case 05-04423 AZ



Bankruptcy Court Statistics – Business Cases

Circuit	Total Filings	Chapter 7			Chapter 11			Chapter 12			Chapter 13		
		Total	Bus.	Percent Business	Total	Bus.	Percent Business	Total	Bus.	Percent Business	Total	Bus.	Percent Business
DC	1,236	830	44	5.30%	63	52	82.54%	0	0	NA	343	11	3.21%
1ST	50,369	34,089	1,235	3.62%	504	411	81.55%	59	59	100%	15,717	245	1.56%
2ND	67,717	55,350	1,568	2.83%	1,382	1,300	94.07%	39	39	100%	10,911	177	1.62%
3RD	84,492	62,119	1,857	2.99%	1,289	1,203	93.33%	32	32	100%	20,997	265	1.26%
4TH	107,304	70,112	2,689	3.84%	976	799	81.86%	34	34	100%	36,181	302	0.83%
5TH	90,412	42,359	3,208	7.57%	1,246	1,169	93.82%	70	70	100%	46,734	595	1.27%
6TH	208,322	150,656	3,932	2.61%	752	648	86.17%	74	74	100%	56,840	404	0.71%
7TH	156,213	118,613	3,085	2.60%	641	576	89.86%	61	61	100%	36,896	262	0.71%
8TH	91,309	68,618	2,237	3.26%	411	391	95.13%	86	86	100%	22,191	202	0.91%
9TH	405,870	311,946	10,114	3.24%	3,552	2,553	71.88%	139	139	100%	90,223	963	1.07%
10TH	84,946	66,372	2,428	3.66%	464	424	91.38%	51	51	100%	18,059	200	1.11%
11TH	222,993	137,417	5,756	4.19%	1,771	1,567	88.48%	98	98	100%	83,696	480	0.57%
TOTAL	1,571,163	1,118,481	38,153	3.41%	13,051	11,093	85.00%	743	743	100%	438,788	4,106	0.94%

Source: Table F-2 Bankruptcy Court Statistics, Office of United States Courts
Retrieved 6/22/2011, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2011/0311_f2m.xls

Nationwide Chapter 12 Survey Methodology and Data Presentation[1]

By: Joseph A. Peiffer[2]

The survey covers all Chapter 12 bankruptcy cases filed from the date that BAPCPA was enacted, April 20, 2005 through July 31, 2011. Data were collected from every district bankruptcy court in the United States and its territories. The case data were obtained by using the "Reports" pull down menu on the CM-ECF screen on a district by district basis. The "Cases" report was selected from the "Reports" menu with the following options utilized to filter the data:

Filter	Choice
Office	No selection
Case Type	No selection
Chapter	12
Trustee	No selection
Date Type	Filed date (default)
From	April 20, 2005
To	July 31, 2011
Open Cases	Yes
Closed Cases	Yes
Sort by	Filed Date
Output Format	Formatted Display

The filtering of data on the CM-ECF screens generally provided information for the entire date range covered by the survey. However, some districts

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[1] © 2011, by Joseph A. Peiffer

[2] Surveyor is a bankruptcy lawyer and shareholder in Day Rettig Peiffer, P.C. of Cedar Rapids, Iowa.

limited searches to 31 days. In those districts the same search was completed on a month by month basis over the date range of the survey.

Each case was listed in counsel's database with the following information being obtained from the court docket:

- Case Name (Joint Debtor's Names Omitted);
- Court;
- Case Number;
- Date of Filing;
- Date of Confirmation;
- Docket Number of Confirmation Order; and,
- Status – Dismissed, Consolidated, Transferred, Other.

If a plan had not been confirmed the case was listed as pending unless it was dismissed, consolidated, transferred or some other disposition had been made by the Bankruptcy Court.

A calculation of the number of days from filing to confirmation was made for each case in which a plan was confirmed. The number of tax years that the case was pending from date of filing to date of confirmation was calculated and entered in the data table.

Within each district the data were analyzed and the following information was determined:

- The total number of cases filed by entities and individuals;

- The total number of cases resulting in confirmation;
- The total number of cases that were dismissed;
- The total number of cases pending before confirmation;
- The total number of cases consolidated;
- The total number of cases transferred; and,
- The total number of cases otherwise completed.

On a district by district basis the following information was calculated from the data on cases where plans had been confirmed based upon the time from filing to confirmation:

- Average days to confirmation;
- Median days to confirmation;
- Average tax years from filing to confirmation; and,
- Median tax years from filing to confirmation.

The range of the docket numbers associated with the confirmation order was determined from the data and the number and percentage of the docket numbers associated with the confirmation orders greater than 50 was determined. The lowest docket number of a confirmation order was 9, found in the Northern District of New York, while the highest docket number of a confirmation order was 615 found in the Central District of Illinois. Higher docket numbers

are generally associated with more difficult business cases and not simple consumer cases like most Chapter 13 bankruptcies.[3]

The resulting data from each bankruptcy court were placed into a table on a circuit by circuit basis for ease in comparison. (App. pp. 22 to 27). Totals of cases filed, cases confirmed, dismissed, pending and other dispositions were calculated. The average days to confirmation by circuit was calculated and placed in the table. The minimum and maximum docket numbers associated with the confirmation orders were determined and placed in the table by circuit. The last column of the table shows the percentage of cases in which the confirmation order was entered with a docket number equal to or exceeding 50. The tabular data from the survey reveals that 65.63% of the cases in which plans were confirmed had the confirmation order with a docket number equal to or exceeding 50. This is indicative of case complexity.

A histogram showing the distribution of the days from filing to date of confirmation was prepared from the raw data for the nation. (App. p. 21). Histograms showing the distribution of the days from filing to date of confirmation on a circuit by circuit basis are not attached to this survey but are available upon request from the survey's author. The five number

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[3] As the docketing of events is not uniform throughout the districts, this statement is, of necessity, an imprecise generalization.

summary of the total database of days from filing to confirmation reveals the following information:

Statistics	**Days**
Minimum Days to Confirmation	34
25% Percentile	178
Median	239
75th Percentile	331
Maximum	1,814

Counsel for *amici* gratefully acknowledges the assistance in data verification and histogram design provided by Erin Buchanan, M.S. Statistics, Iowa State University 2011 and Robert Buchanan, M.B.A., University of Northern Iowa 2010.